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SUPREME COURT, U.S.

United States Court of Appeals
FOR THE SECOND CIRCUIT

CIVIL ACTION No. 72-376

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. MCSWEENEY, and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Plaintiffs-Appellants-Appellees,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Defendants-Appellees-Appellants.

ON APPEAL FROM JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF OF DEFENDANTS-APPELLEES-APPELLANTS

HALE STIMSON RUSSELL & NICKERSON,
Attorneys for Defendants-Appellees-Appellants,
122 East 42nd Street,
New York, N. Y.

COURT OF APPEALS

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United States District Court
SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 72-376

UNITED STATES OVERSEAS AIRLINES, INC., and RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways, and RALPH COX, JR., LETITIA H. COX, REBEKAH L. McSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Plaintiffs,

vs.

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Defendants.

Before: Hon. EDMUND L. PALMIERI, District Judge.

New York, June 15, 1956
10.30 o'clock a.m.

APPEARANCES:

MAURICE L. SCHOENWALD, Esq., Attorney for Plaintiffs;
MAURICE L. SCHOENWALD, Esq., and
BERNARD B. POLAK, Esq., of Counsel.

HALE STIMSON RUSSELL & NICKERSON, Esqs., Attorneys for Defendants;
EUGENE H. NICKERSON, Esq., of Counsel.

* * *

[9] Mr. Schoenwald:

* * *

I made an application for the adjournment of this trial because the person we expected would testify as to damages, Mr. Herbert Goldberg, was taken ill with a heart attack and is still ill, and counsel offered to permit me to introduce a document which would indicate what Mr. Goldberg would have testified to if he had been here, and this is contained in a stipulation.

Testimony

• • •

[13] RALPH COX, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

• • •

[78] The Court: In other words, the purport of it was you made your complaint and they told you to go [79] ahead and perform?

The Witness: Yes.

The Court: You told them you couldn't perform and it ended on a note of disagreement, without anything being agreed to?

The Witness: That is correct.

• • •

[82] *Cross-examination by Mr. Nickerson*:

Q. Mr. Cox, what office do you hold in United States Overseas Airlines? A. Vice-president.

Q. Are you still a member of the partnership of Ocean Air Tradeways? A. Yes.

Q. Were you president of U. S. O. A. in 1951? A. I was.

Q. When did you become vice-president? A. A couple of years ago.

• • •

[84] Q. How long had you been in the aviation business in 1951? A. Do you mean when did I start to fly as a pilot or in business as such?

Q. In any capacity. A. I started in aviation in 1939.

Q. When did you start in USOA? A. USOA became operative in January 1951. Prior to that there was an Ocean Air Tradeways operating, which started in 1946.

Q. What kind of operation was that, Ocean Air Tradeways? A. It was the same as the USOA operation. It was a non-scheduled U. S. carrier type operation.

Q. Transporting passengers, mail, cargo? A. We were never permitted to carry mail. We did transport passengers and cargo.

Q. Did you have any other companies that you were connected with in the aviation business in 1951? A. No.

• • •

[85] Q. How many employees were there of USOA? I am now referring to United States Overseas Airlines as USOA. You understand that? A. Yes.

Q. How many employees were there of USOA in the summer of 1951, July? A. We had 50 to 75 employees, I believe.

Q. How many officers did you have? A. Four.

Q. Who were they, with the titles? A. I was the president and treasurer. Clemett, Earl Clemett, was a vice-president of maintenance. Lloyd Webb was vice-president of operations. R. L. McSweeney was the secretary.

Q. Did you have a man named Jones there? A. Yes.

Q. What was his title, if any? A. He was purchasing agent at the time.

Q. Did you have a man named Sanour? A. Excuse me. We had Mr. McCormick also as a vice-president. I had overlooked John McCormick.

[86] Q. What was his job? A. He was executive vice-president and he was the Washington representative.

Q. Did you have a man named Sanour? A. We did.

Q. What was he? A. He was a pilot and general business administrator with us.

Q. Wasn't he a lawyer? A. He was a graduate lawyer.

* * *

Q. Mr. Cox, you testified on your direct examination that in May 1951 you were in Europe. When did you go to Europe? A. May of 1951.

Q. Yes, what time in May? A. Around the middle of May.

Q. Were you over there on business of the USOA? A. I was on business generally, yes.

Q. Where did you go in Europe? A. We went to Paris, England, Germany; I think Italy.

Q. Where did you go in Italy? [87] A. Where did I go in Italy? Milan and Venice.

Q. While you were in Paris did you receive any correspondence concerning AVE? A. I believe I did, from Mr. Clemett.

* * *

Q. I show you copy of a letter dated June 5th and I ask you whether you received the original of that when you were in Europe. A. Yes, this appears to be a copy of what I received.

Q. Do you notice in that, Mr. Cox, the sentence "Contact AVE in Rome, Italy for complete picture on business from Rome to Venezuela"? A. I notice that.

Mr. Nickerson: I offer this in evidence, your Honor.

• • •

[88] (Received in evidence as Defendant's Exhibit BQ.)

Q. Had you heard about AVE prior to the date of that letter? A. Yes.

Q. Whom had you heard from? A. From one of our pilots by the name of Patton.

Q. How long before that letter was it that you heard from him? A. Oh, I would say two or three weeks.

Q. Did you contact AVE in Rome, Italy for the complete picture on business from Rome to Venezuela when you were in Europe? A. I can't recall if I did. I don't think I did. Jones may have sent them a wire. But if my recollection is correct, we never received any reply or it was missent or something.

Mr. Nickerson: Do you have a copy of that wire?

[89] Q. I show you Defendant's Exhibit C for identification and ask you if you received that letter. A. Yes, I think I received this letter.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit C.)

• • •

[90] Q. Defendant's Exhibit C, Mr. Cox, appears to set forth certain communications from Clem to Fritz and Fritz to Clem. Can you tell us who Clem was? A. That was Clemett, Earl W. Clemett.

Q. And can you tell us who Burger was—I am sorry—who Fritz was? A. Fritz refers to Fremont Burger, our chief pilot.

Q. I show you Defendant's Exhibit D for identification and ask you whether that is the communication which you referred to, which Jones sent to AVE. A. Yes, this looks like a copy of the—

Mr. Nickerson: I will offer that in evidence.

A. (Continuing) —telegram. We never received an answer to that.

Mr. Schoenwald: No objection.

(Received in evidence as Defendant's Exhibit D.)

* * *

[91] Mr. Nickerson:

* * *

Is it conceded that Defendant's Exhibit C is dated June 7, 1951?

Mr. Schoenwald: Yes, it is.

Q. On Defendant's Exhibit D, Mr. Cox, Mr. Jones describes himself as general manager. Was that correct? A. That eventually became correct. I don't know the date.

Q. June 10, 1951? A. Then he at that time was general manager.

Q. Was he over in Europe with you at that time? A. He was.

Q. Mr. Cox, did you talk with one of your vice-presidents, Mr. Webb, in London about AVE in June of 1951? A. I spoke to Webb. I think he came over as a [92] crew member and went back around that time, and he volunteered that he would look into this, the possibilities of this operation, when he returned to the States.

I said, "Well, go ahead and do it."

Q. Have you your diary here, Mr. Cox? A. No, I don't.

Q. Didn't bring it with you? A. No.

Q. I will read from your deposition. See if this refreshes your recollection as to what your diary said on the date of May 31, 1951:

"Lloyd called at about eleven p.m."

Who is Lloyd, Webb? A. That would be Webb.

Q. "436 is loaded and ready to return to the United States and he is going along since so much needs to be done in New York and he will try to contact AVE in Caracas."

Do you recall inserting that in your diary? A. That is probably correct, yes.

Q. Do you recall whether it is correct? A. I cannot recall inserting it.

Q. I will show you your deposition. [93] A. If it is in there, it is in there.

• • • •

A. That is substantially what happened, to my recollection.

Q. Do you recall whether that language that I have read is in your diary? A. Not without checking the diary. It sounds like it, though.

Q. Will you bring your diary tomorrow? A. I don't know where the diary is.

Mr. Nickerson: Mr. Schoenwald, will you bring Mr. Cox's diary tomorrow?

Mr. Schoenwald: If I have it. I don't think that we have it.

Q. Did you dispose of it, Mr. Cox? A. No, I never dispose of things like that.

Q. Where is your diary, do you know? A. It is probably at my home.

Q. Is that where you generally keep it? A. That's right.

Q. Will you bring that tomorrow, Mr. Cox? A. Well, I would have to have it sent in. It [94] isn't locally available.

• • •

The Court: Were you reading from a deposition taken before trial?

Mr. Nickerson: Yes, sir.

The Court: In the absence of the diary itself, I take it there would be no quarrel with any entry from the diary read into the deposition, it would be accepted as secondary proof.

Mr. Schoenwald: We are not making any objection to the use of the text of the deposition.

• • •

[96] Q. I will show you Defendant's Exhibit E for identification and ask you whether you received a copy of that. A. Did you ask me if I got a copy of this?

Q. Yes. A. I probably did, but I don't recall it. It is from Clemett to Bush.

Mr. Nickerson: I will offer it in evidence.

Mr. Schoenwald: I am not going to object to its admission as an exhibit.

• • •

[97] (Received in evidence as Defendant's Exhibit E.)

• • •

[98] Mr. Nickerson: May I have a letter dated June 17th from Clemett to Cox? I don't have a copy.

Q. I show you copy of a letter dated June 17th, addressed to "Dear Ralph" and signed by "Clemett" and ask you whether you received the original. A. Yes, I believe I received the original.

Mr. Nickerson: I offer that in evidence. That will be BR, your Honor.

• • •

(Received in evidence as Defendant's Exhibit BR.)

Q. Do you recall, Mr. Cox, after you got back from Europe, who was the first person in your organization that you talked to about AVE? A. McCormick, I believe, was the first.

Q. Let me refresh your recollection. On page 14 of your deposition, where you say, "When I got back from Europe I heard about AVE from a man by the name [99] of Waters." Do you recall whether or not—does that refresh your recollection whether he was the first one you talked to? A. It doesn't recall to my recollection he was the first because when I got off the ship I was met by McCormick, whether—

Q. It doesn't refresh your recollection? A. And at that time—

Q. Excuse me. A. At that time I hadn't even met Waters. I didn't meet him until two or three days later.

Q. When was Waters hired by you? A. He was hired when I was in Europe, sometime in June, I think.

Q. And you did talk to him after you got back from Europe, did you? A. After I got back to Wildwood. First I stayed in New York a couple of days. Then I spoke to Waters—I met him and I spoke to him.

Q. Didn't you know whether Waters had been employed by AVE prior to the time he was employed by USOA? A. I believe he stated he had.

Q. Did you talk to him about the potential of [100] the operation at all? A. It seems to me Waters took part in a conversation with McCormick and Burger and Clemett down in Wildwood, but it was basically communications and Waters telling us how familiar he was with Spanish and of the type of operation down there.

Q. Did you know whether Mr. Waters had been over the AVE route before? A. It seems to me he told me he had been over it in his position down there with AVE before.

Q. Does this sentence from page 18 of your deposition refresh your recollection as to whether you talked about the potential with Mr. Waters, reading from the middle of the page: "He understood they had a potential of two trips a week between Venezuela and Europe"? Do you recall discussing that with Waters? A. Probably I did.

Q. Do you recall that it was Waters who made the arrangements for Colonel Marcano to meet with Mr. McCormick or tried to make arrangements? A. I don't know if he did or not.

Q. I will read from your deposition, page 23: "I spoke with McCormick by telephone from [101] Wildwood. He was in Washington. And it seems to me that Waters had made arrangements or thought he had made arrangements for Marcano to meet McCormick"?

Does that refresh your recollection? A. Yes, that does.

Q. After you got back did you talk to Clemett about the AVE operation? A. Yes.

Q. What was Clemett's position with the company? What was his function? I know he was a vice-president. A. He was in charge of maintenance.

Q. Was he a vice-president? A. That's right.

Q. Did you talk with Webb after you got back to the United States about AVE? A. I believe so, but it was mostly Clemett and McCormick, really, mostly McCormick and Burger.

Q. You also talked with Burger, did you? A. That's right.

Q. Do you recall that you kept after McCormick in order to make an appointment with Mr. Marshall or Colonel Marcano to discuss entry into a deal? A. I don't recall keeping after McCormick. McCormick was in Washington, and just whether he kept [102] after Marshall or vice versa I don't recall. Usually McCormick and I spoke every day on the phone, though, about other business.

Q. Page 26 of your deposition: "After my conversation with Waters, I called McCormick to see what he had done, if anything, or what had transpired."

Do you recall calling McCormick and asking that? A. I probably did. I can't recall the conversation, but I was quite sure, as I say, well, that I spoke every day to McCormick.

Q. Did you ask him what he had done? A. Yes.

Q. With respect to AVE. A. I believe I did, yes.

Q. In your conversations with Mr. Clemett in or about June of 1951, did he make any argument to you that a deal with AVE wouldn't be a good deal? A. On the contrary, Clemett was the one that—Clemett had that Pollyanna viewpoint towards almost everything—he was in favor of it because we didn't have too great an operation. We were dependent from time to time on military contracts, and he thought it would be a good idea to get a schedule run going, if [103] I remember correctly, and there were a lot of conversations back and forth. One day we thought it sounded good, the next day we thought it didn't sound so good. We didn't know too much about it; it was a speculation.

Q. So Clemett was the one who thought it would be a good opportunity, did he? A. Clemett wrote me two letters in Paris, and was really the first one I heard about it from.

Q. You are sure he didn't argue to you that it wasn't a good opportunity? A. If he did, I don't recall it.

Q. Are you sure he did say that? A. I am fairly certain. All of us viewed it with favor, provided—

Q. Now I am asking you about Clemett and only about Clemett. A. Clemett took part in the conversations. It wasn't just Clemett and me. We were all in this thing together.

Q. Did you know who Gotch & Crawford were, Mr. Cox? A. No, I did not.

Q. Had never heard of them before, had you? [104] A. No.

• • •

[105] Q. How long had Clemett been with you, Mr. Cox, in 1951, July?

• • •

A. I think he had been with us for around six [106] months.

Q. How long had Burger been with you? A. Probably —I think Burger came with us around the first of the year, around Christmastime, thereabouts, of 1950.

Q. How long had Webb been with you? A. He had arrived a couple of months after Clemett, in the spring of 1951.

Q. How about Mr. McCormick? A. McCormick had been with us for about ten months probably at that time.

• • •

[112] Q. Do you or do you not recall what the general outline of the proposed operating arrangements was? A. Right now I don't recall it. I would have to read it over again.

Q. Do you recall that in those proposed operating arrangements AVE was to retain responsibility for procurement, promotion, reservations and ticketing of all traffic? A. That is what they proposed, but we said that we weren't interested in having traffic separated, so [113] that we would just take it or leave it when it was generated and not control tariffs or, rather, the commissions, and the policies of procurement, et cetera. We were specifically discussing that, referring to generating traffic in American colleges out of Bermuda, which was talked about to some extent, and I didn't feel we should be faced with a ticket agent coming along in the middle of this thing and saying, "We want 40 percent," or something like that. That is when I said we are going to have to have control of this traffic.

Q. So right from the beginning, Mr. Cox, you told Mr. Marshall, did you not, USOA wanted control of all traffic procurement, did you? A. Or words to that effect. I might add that particularly all traffic in Rome was entirely—

• • •

[117] Q. Let me read from your deposition, page 88: "He (referring to Mr. Marshall) said that openly the Venezuelan embassy would probably not embarrass themselves too much by showing partiality to AVE."

Do you recall that? A. That's right, he said that.

Q. Do you recall testifying to that? A. Yes, I do, and that he further stated—

Mr. Nickerson: I move to strike it out. This witness will not remain responsive to my question.

The Court: Yes.

• • •

[120] Q. Who drafted Defendant's Exhibit G? A. Burger drafted this, to my best recollection.

• • •

[121] Q. Did you make any change in it? A. After Burger drafted it?

Q. Yes. A. I don't recall; I might have.

Q. You know you made no changes in it, don't you? A. We are looking back five years. We went over these notes. He made a rough draft and then—usually he made a rough draft and then a smooth copy. There may have been some changes but if there were I don't remember.

Q. Have you refreshed your recollection for this trial by reading your deposition? A. Some time ago. I haven't had a chance to do it in the—to do it recently.

Q. I read from page 100, next-to-the-last question:

"Q. Did you change anything that Mr. Burger had written? "A. No, not that I recall."

Do you recall that testimony? A. Yes. Just about what I said now. I don't recall.

[122] Q. From page 100:

"Q. Do you have a prior draft of Defendant's Exhibit G? A. I don't know of any such thing."

Do you recall that testimony? A. I can't recall it. What is G?

Q. G is the exhibit I just showed you, the letter dated July 19th. A. Do I have a prior draft of that? I don't recall.

Q. Do you recall that testimony? A. That is in 1951, that testimony, isn't it, or 1952?

Q. Do you recall that testimony? A. I don't recall stating it just that way. If it is in there, I must have said it.

• • •

[125] Q. Were there any prior drafts of the letter of July 21st, Defendant's Exhibit I, Mr. Cox? [126] A. I cannot recall.

Q. I will read from your deposition, page 112:

"Q. Did he (referring to Burger) make any prior draft? A. I don't believe there were any such."

Do you recall that? Does that refresh your recollection? A. Yes.

Q. Do you recall making a reference to the draft of—to the letter of July 21, 1951, Defendant's Exhibit I, in your diary? A. I don't recall.

Q. Have you read your diary since you were examined on your deposition? A. No.

Q. I will read from the top of page 117, your testimony, as to what is contained in your diary for July 21, 1951, Saturday:

"Burger and I worked out an answer to Marshall's telephone call regarding AVE and I hope it is accepted."

Do you recall that? A. I probably wrote that, yes.

Q. Did you have any discussion with Mr. Marshall [127] about the provision in the contract which recites—it is IG, in the third sentence—"The president of CAVE shall be reimbursed by Overseas for actual business expense and, subject to the attainment of an annual average load factor of not less than 50 percent, shall also receive an annual salary of $15,000 a year."

Did you discuss that load factor of not less than 50 percent with Mr. Marshall?

• • •

A. I believe so.

Q. When you signed the contract on July 25th, Mr. Cox, who was present? A. Miss Wilcox, McCormick, Marshall, and I think Burger.

Q. Sanour was there, wasn't he? A. Was he there? I don't remember if he was there or not.

Q. Do you recall whether he was or not? [128] A. I don't recall his being there. He may have been.

Q. I show you Defendant's Exhibit Q for identification and ask you whether you signed the original.

• • •

A. Yes. I gave that letter to Mr. Burger.

Q. Can you recall the date when you signed it, approximately? A. It must have been about the time that he left with the airplane for Caracas from Wildwood. That is my best recollection.

Q. About what date was that? A. I would have to check those log records. It was around the middle of August, I think.

Mr. Nickerson: I offer it in evidence.

• • •

(Received in evidence as Defendant's Exhibit Q.)

[130] Q. I show you Defendant's Exhibit P for identification.

• • •

[131] A. Yes, I believe this came from Burger.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit P.)

• • •

Q. Mr. Cox, do you recall this testimony from your deposition:

"Q. Did you discuss Mr. Waters' analysis? That is the exhibit that has just been marked. A. I considered Mr. Waters, who told me he had gotten a couple of books published, was a little verbose on some of his comments, but I took into consideration the experience and background of his knowledge of this AVE operation."

• • •

[132] A. Yes.

Q. "I did feel that Waters was primarily a flight communications expert but not an overall expert on every single phase. However, his comments on other departments we did not take lightly because he has been over

the runs and he knew these people and we had to start somewhere."

Do you recall that testimony? A. I believe I do.

Q. Did you discuss Defendant's Exhibit P, which has just been marked, with anyone at the time you read it? A. Is that signed by Burger or Waters?

Q. Waters. A. That is Waters? I think I discussed it with Burger.

Q. Did you discuss this sentence with Burger: "Madrid was the most difficult to manage in the European area during AVE's past experience for many reasons. The laws were difficult to comply with, dollars are practically impossible to remove from the country. [133] Thus, only token passengers should be loaded at Madrid."

Do you recall discussing that with Mr. Burger? A. That is westbound out of Madrid, isn't it?

Q. What I read, do you recall discussing it? A. Yes, I think we discussed that.

• • •

Q. When did you discuss it? A. This was prior to our going down to Venezuela or else it was prior to our sending the airplane down. These were all Mr. Waters' comments.

• • •

[134] Q. Do you recall discussing with Mr. Burger whether Paris was a trying station? A. No, I don't recall that. We weren't even going to go into Paris, certainly not in the initial phases.

• • •

Q. As a matter of fact, on your first flights you considered that Portugal was only going to be the fuel stop,

didn't you? A. We assumed full loads westbound, sir. We were only going to stop for fuel, that's right, but we anticipated developing it.

• • •

[136] Q. Do you recall that Colonel Marcano told him in the presence of you and several others of USOA that he should give you any information that you wished that [137] was in the books? A. I don't recall that.

Q. Do you recall that he didn't say that? A. I don't recall that he said it or not.

Q. Do you recall you requested the by-laws of CAVE? A. It seems to me we did.

Q. Did you get them? A. I think we did.

Q. Do you recall that you asked Colonel Marcano to come to—cancel an agency contract which he had with an agent in the United States? A. Along the lines of our wanting to control the traffic, yes, we asked that he cancel, I think it was, Red Air or some such name, up in New York.

Q. Do you recall whether he did do it while you were down there? A. He said he sent a wire doing so.

Q. Did you see the wire that he sent? A. I think we had copies of that wire. I cannot remember offhand.

Q. I show you Defendant's Exhibit U and ask you whether you saw a copy of that? A. It seems to me I recall seeing this.

[138] Mr. Nickerson: I offer it in evidence.

• • •

(Received in evidence as Defendant's Exhibit U.)

Q. When you came back from Caracas, after that trip, did you leave anyone down there from USOA? A. I think we left Waters down there.

Q. Did you leave Van Boheman? A. I can't recall if we left Van Boheman or not. We may have, though. I would have to check that.

• • •

Q. I will show you Defendant's Exhibit AC for identification, a cable from Burger to Cox, dated August 20, 1951, and ask you if you received the [139] original of it. A. I believe we received this at Wildwood, yes.

Mr. Nickerson: I offer that in evidence.

• • •

Q. What was the date, on or about the date?

• • •

A. This is the date—the day and month. That is 20/8. It must be August 20th but I cannot tell from that. That doesn't seem right. I don't think that is correct.

• • •

Q. I show you Defendant's Exhibit AL for identification and ask you if you received the original of that. [140] A. Yes, I think we received this too.

Mr. Nickerson: I offer that in evidence.

• • •

Q. Do you recall about when you received it? A. It is dated August 23rd, I believe, '51.

• • •

(Received in evidence as Defendant's Exhibit AL.)

(Defendant's Exhibit AC received in evidence.)

• • •

[141] Q. I show you Defendant's Exhibit AB for identification and ask you if you received the original of that on or about its date. A. Yes, we received this.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit AB.)

Q. Did you give Mr. Burger permission to negotiate an inter-line agreement with Il Italia? A. In so far as USOA could do so, yes.

• • •

[145] Q. Have you been a defendant in quite a lot of lawsuits, Mr. Cox, you or your company? A. In quite a lot of lawsuits?

Q. How many?

Mr. Schoenwald: I would like that question to be clear. Is he talking about the company or Mr. Cox?

Mr. Nickerson: I will break it down.

Q. Mr. Cox, first, personally. A. Oh, I have been sued a few times, but I think quite a number.

Q. How many? A. I guess about three or four lawsuits I have had.

Q. And how about USOA? Has USOA been a defendant in quite a number of lawsuits? A. No, I would not say so.

Q. How many?

• • •

The Court: I will allow the question on [146] the condition that it be amended to provide that

it cover only the time of his connection with the company.

Q. While you were with USOA how many lawsuits has it been in? A. There have been two or three.

Q. Are you sure that is all? A. Well, are you talking about going to trial or being sued and various things?

Q. Suits brought against you. A. How is that?

Q. A suit that is brought against you irrespective of whether you went to trial. A. I can't tell you. Every once in a while some employee sues for some claim of some sort or other and it may go to trial and it may not.

Q. Didn't Waters sue you for his salary you didn't pay him? A. We paid him. We overpaid Mr. Waters. Mr. Waters had quite a claim there that was just fantastic.

Q. He sued you? A. He sued us, that's right.

Q. Didn't Mr. Warner sue you? A. Mr. Warner sued us, that's right.

Q. Was that for services that he rendered you? [147] A. And Warner set them up, set himself up as an expert over Burger, and claimed fantastic sums which weren't in the picture at all.

Q. USOA has had quite a history of violations of the Civil Aeronautics Administration? A. Oh, no, they haven't. No, they haven't.

Mr. Schoenwald: Objection.

Q. Let me ask you this. Has USOA ever had any violations alleged against it by the Civil Aeronautics Board for failure to maintain its records at its base—

Mr. Schoenwald: Objection.

The Court: Why are you going into this?

Mr. Nickerson: Your Honor, I want to show—

The Court: Relationship between the corporation and the civil regulating agency could not possibly affect the issues of this case or the witness's credibility.

Mr. Nickerson: I want to show the absolute disregard that this individual has for any legal processes and any regulation, and I have them here, they are as long as your arm, from the Civil Aeronautics authority as to what violations are outstanding against them, and I think that affects the credibility and it shows the absolute disregard these people—

[148] The Court: You see, we would have to undertake a trial within a trial in order to ascertain the merits and validity of these various violations. I could not undertake to do that.

Mr. Nickerson: Maybe he will concede some of them when I read them.

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[149] The Court: Yes. Let me suggest this, you make an offer of proof and then I will rule on it. I am afraid I cannot let you go into it but I will permit you to make an offer of proof.

Mr. Nickerson: I offer to prove that USOA has had the following violations—had the following violations outstanding against it: in December 1951, one, failure to maintain aircraft and engine records at the company's principal maintenance base; two, operation of a propeller approximately 315 hours in excess of approved overhaul time; three, employment of flight navigator who was not in possession of an appropriate navigator and

medical certificate; four, operation of an aircraft with unsecured license, life raft, ladder, cargo, oxygen bottle, et cetera, in the aircraft; five, operation of an aircraft with a two-pilot crew in excess of prescribed flight time limitations; six, operation of an aircraft with a captain in command who flew in excess of flight time limitation; seven, failure to maintain proper airmen records; eight, failure to maintain complete flight manifest record; nine, failure to require pilot training in accordance with the company's operations [150] when his instrument and equipment standard checks had expired; eleven, operation of an aircraft with loose passenger seats, trunks and unsecured equipment in the cabin; twelve, operation of an aircraft with an insufficient number of seats and seat belts for the number of passengers aboard; thirteen, lack of proper pilot check by qualified company check pilot; fourteen, operation of an aircraft with a captain who flew in excess of prescribed limitation; fifteen, operation of an aircraft with a crew who flew in excess of prescribed flying time limitations; sixteen, failure to maintain records for 144 flights; seventeen, utilizing of five pilots in excess of prescribed flying time limitation; eighteen, operation of aircraft in trans-Pacific operations without the required radio transmitter frequency; nineteen, operation of aircraft in excess of maximum allowable gross weight limit; twenty, operation of aircraft again in excess of maximum allowable gross weight limits; twenty-one, same, twenty-two, the same; twenty-three, the operation of aircraft in an unseaworthy condition in that inadequate size

wire, an inadequate circuit breaker and improperly installed generator system were utilized aboard an aircraft.

[151] The next number, company scheduled its aircraft to meet its operational requirements without proper organizational coordination to insure adequate maintenance; next, company has failed to provide for its employees adequate and proper engineering and operational data to insure that the operation of its aircraft will be in accordance with the operating requirements of the civil air regulations.

Next, flight crews have exhibited a lack of requisite knowledge to operate aircraft communications equipment in international and overseas operations.

Next, routine control of maintenance of communications equipment is inadequate because of absence of a company inspection system as required by the civil air regulations.

Next, the company has failed to provide adequate engineering data and information to its maintenance personnel in order to provide for proper modification of the aircraft and aircraft components.

Next, company has failed to establish the required organization maintenance training program.

I offer to prove that.

The Court: Are you finished?

Mr. Nickerson: Yes.

[152] The Court: I sustain the objection on the ground that it would lead us far afield and involve us in issues which we are not called on to deal with in this case. It could not possibly have any relevancy here. I rule it out.

Q. As a matter of fact, Mr. Cox, you are in contempt personally of a judgment right here in New York, aren't you?

Mr. Schoenwald: Just a moment.

A. That is not—

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Mr. Schoenwald: I also object to the examination of the witness in connection with the last [153] question. The only possible area of question of a witness's credibility would be his conviction of a crime. Unless the question encompasses a conviction of a crime, I feel it is improper.

The Court: You say the only way a witness can be impugned is by proving he has been convicted of a crime?

• • •

The Court: You may ask him whether he was in contempt of judgment.

Q. Is there a judgment outstanding against you in a separation action here in New York? A. No.

Q. Wasn't there a judgment against you? A. There was at one time.

Q. Didn't it provide that you should make certain payments? A. They were made.

Q. Yes, and you didn't come into the state, did you? [154] A. I had a child that was in danger of its life and I stayed out of the state with an infant then on a psychiatrist's recommendation, and I will do it again if it is the safety of my child, and that is the only contempt that was against me, sir, and it has been removed.

• • •

[158] *Recross-examination by Mr. Nickerson*:

Q. Mr. Cox, when you listened in on the telephone call that Webb and Colonel Marcano had—do you recall that one? A. Yes.

Q. Did you tell Colonel ~~Marcano you~~ were listening? A. Did I tell him?

Q. Yes. [159] A. No, I didn't tell him. I didn't speak to Colonel Marcano.

Q. Did Webb tell him that you were listening? A. I don't think so.

• • •

Q. Did you tell Colonel Marcano that you were making a tape recording of that conversation? A. No.

Q. You made other tape recordings of other conversations you had with people representing the defendant. didn't you? A. Did I do what?

Q. Made other tape recordings of other conversations that you had with people representing the defendant, didn't you? A. It seems to me I made a recording when Mr. Russell threatened me on the phone, yes.

Q. Did you make any other tape recordings with [160] people representing—conversations with people representing the defendant? A. Not that I can remember.

Q. When you made the tape recording, with Mr. Russell, did you tell him you were doing it? A. No, I didn't.

Q. Is it your practice to make tape recordings of telephone conversations?

• • •

A. Occasionally we make them.

• • •

[171] JORGE MARCANO, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Schoenwald:

[172] Q. Colonel, where were you educated? A. In Venezuela.

Q. What was the nature of your education? A. I went to school, to high school, and went to navy school.

Q. Will you tell us, do you have any degrees? A. I didn't take any degrees except in the armed forces—rank in the armed forces.

Q. Have you held any administrative or executive position either in the military or in business? A. Yes, I have.

Q. What military executive positions have you held? A. I have been chief of different squadrons, pursuit squadron, bomber squadron, patrol squadron.

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[215] Q. In your prospectus, on page 5, I think that you will find a recitation or a description of the condition of the company which does not show the possession of assets roughly comparable to $1,100,000, is that correct?

Mr. Nickerson: I think it speaks for itself.

A. These were moneys in Spain. They weren't at our disposal.

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[263] Mr. Schoenwald: If your Honor please, I don't want to encumber the record with undue argument. However, I thought that I understood the witness to indicate in his testimony that, as a matter of fact, that the office would function even in the absence of Mr. Savino. The letter is a letter from a person [264] characterized by the defendant to be his general agent or general officer or

general office manager in Italy. He states in this letter, made at the time of the event, that the office will not function.

The Court: Mr. Marcano said the business would continue to function when the successor was appointed. Isn't that what you testified?

The Witness: Yes.

The Court: Mr. Schoenwald, I direct you to pay closer attention to your own examination of the witness and not place me in the position of pointing out what the witness has testified to.

Mr. Schoenwald: Thank you, Judge.

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[325] HENRY SCHINDALL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

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[344] *Cross-examination by Mr. Nickerson:*

• • •

[351] Q. Mr. Schindall, you don't know whether those accounts receivable, other than the $261,000, which appears on Exhibit 6, were or were not collected and distributed, say, to stockholders, do you? You are just assuming that they were written off, aren't you? A. I see no evidence of dividends to stockholders, of any other collection, and I am assuming they were written off.

May I say that my experience with accounts receivable from employees, which remain on the books for long periods of time, and my experience with receivables of, other various sundry receivables which remain on the books [352] for a long time, is that they are seldom collected, almost always written off, at least substantially.

• • •

Q. Can you tell us specifically whether any accounts receivable from Rome in 1950 were in fact not collected? A. No. It is possible that some were collected.

Q. I am just asking you what you can trace. Can you trace whether any accounts receivable from Paris were not collected? A. No, there is no evidence of collection.

Q. Now—excuse me, I am sorry. A. There is no evidence of collection.

Q. Yes. With respect to Lisbon, can you tell us whether any accounts receivable from Lisbon in 1950—can you trace whether they were not collected? A. No, sir.

Q. Can you trace whether any accounts receivable from Caracas, sales of tickets to passengers in 1950, were not collected? A. I am a little uncertain of the meaning of the word "trace" as you use it. Would you care to [353] explain it?

Q. Is there any record that you have seen that shows specifically that accounts receivable from sales of tickets to passengers in Caracas were not collected, other than—A. I don't recall.

Q. (Continuing)—your assumption from, the general assumption from the statement of estimated assets and liabilities? A. Yes.

Q. Which you have already told us as of June 15, 1951? A. May I explain this?

Q. Will you answer my question and then explain it? A. I don't recall. I say that because I examined a number of these original vouchers, called comprobanes, and I believe that some of them had entries showing writeoffs of accounts receivable.

Q. Do you recall the amount of those? A. No.

Q. In round figures? A. No. I recall seeing some writeoffs of that character.

* * *

[354] Q. You don't actually know from your examination of the books, do you, when the various accounts receivable which were written off became worthless, do you? A. No, sir.

Q. I think you testified on your direct examination that the reserve which appears on page 6 of Exhibit 357 of $126,316, reserve for exchange loss, that that should have been put on the books in 1950; did you testify to that? A. I believe so, yes.

Q. You don't know what portion of that is allocable to 1950 and what portion allocable to 1951, do you? A. Yes, I believe it is all allocable to 1950.

Q. Didn't they make sales tickets in 1951 in Spain? Didn't they put on their books pesetas in Spain in 1950? [355] A. My recollection is that this account existed at $250,000 at the end of 1950 and that it remains about the same. There were no collections, since no funds could have been gotten out of Spain.

Q. Yes, but they did make, or did they put on the books receipts of pesetas—perhaps that is the wrong word, I think—receipt of pesetas in 1951? That is the point I am asking. A. I don't know.

Q. In 1950 you know that this was an operating airline, do you not, Mr. Schindall? A. Yes, sir.

Q. And you don't know whether in 1950 whether they expected or not to be able to get their pesetas out of Spain, do you?

[356] (Question read.)

A. I am not sure I understand the question. Do you mean—

Mr. Nickerson: Would you read the question?

The Witness: May I ask—

Mr. Nickerson: Yes, go ahead.

The Witness: Do you mean were they aware during the year 1950 of the difficulty of getting funds out of Spain? Is that what you mean?

Mr. Nickerson: No, I am not asking that. Would you read the question again?

(Question read.)

A. No, I do not. May I say, in addition that I recall seeing correspondence during 1951, I believe, although I am not certain of the date, the tenor of which was there were difficulties so—

Q. In 1951 you saw that? A. I believe it was in 1951.

Q. Dated 1951? A. Early in 1951. There were several letters. Attempts were being made, apparently, to get this money but they weren't available.

Q. In a statement of estimated assets and liabilities, where it shows a loss, would that not [357] ordinarily put a person on notice as to the facts with respect to the loss? A. It would merely indicate a loss.

Q. Yes, but wouldn't a prudent person look at the facts at that loss? A. Yes.

Q. As an accountant? A. Yes.

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[359] JORGE MARCANO, Resumed.

Direct examination continued by Mr. Schoenwald:

[401] Mr. Schoenwald: I would like to offer this letter in evidence as a communication from the attorney in fact to his agent as of August 1st, a time before the withdrawal or rescission of the contract or any proceedings were commenced and as a letter showing the state of knowledge of the defendant, bearing upon his intent, a necessary element in the case of fraud, bearing upon wilful-

ness and by its very nature and damages, and dealing with the credibility of the witness, and, in so far as it relates to the stock, setting forth the knowledge of the defendant dealing with the shares of stock involved in this case. And I direct your Honor's attention also to the fact that it indicates the liability of this company CAVE as well as the Colonel to Flying Tigers, one of the liabilities not mentioned in the prospectus, in the two places [402] which I think are pretty important dates marked out in advance on the document.

Mr. Nickerson: It will take less time if I do not object to these and reserve my motion to strike them. May I do that?

The Court: All right. It will be marked in evidence.

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[403] Q. Did you send a communication—did you send this letter out?

Mr. Nickerson: We concede that it was, your Honor, 272 for identification.

Mr. Schoenwald: I would like to have this marked in evidence.

Mr. Nickerson: May I reserve my motion to strike? It will take less time.

The Court: Yes, all right.

(Plaintiff's Exhibit 272 for identification received in evidence.)

[404] Mr. Schoenwald: Do you also want to concede as to the admission of this document in evidence (indicating)?

Mr. Nickerson: I will let it in subject to my

motion to strike, your Honor. I am not going to object to any of this because it takes us more time.

• • •

[429] *Cross examination by Mr. Nickerson:*

Q. When were you first engaged in anything to do with aviation? A. 1928.

Q. Will you give us the various posts you held from that time up until 1950, when you became president of CAVE? Would you run through them rapidly. A. Yes. I was chief of different air units, chief of paratroop squadron, bomber squadron. I was instructor in the Aviation School.

I became Director of the Military School of Aviation. I came out to the States and spent one year here through school, a different outfit, U. S. Air Force outfit; went back and became Liaison Officer with the Canal Zone and military attache, assistant military attache in Panama. Went back to Venezuela, became Inspector General of Aviation.

After that I was Air Attache to the Venezuelan Embassy in Washington. After that I was Military Attache and Chief of Military Missions at the Embassy in Washington; chief representative in the Inter-American Defense Board.

[430] From there I went to Venezuela and became Minister of Communications. And after that I went to the United Nations as a representative to the United Nations.

Q. Did you ever see anyone from USOA prior to the time that the contract dated July 25th was signed by you? A. No, I did not.

Q. Did you ever hear from any of them? A. I did hear once from a man called Waters, who used to work

for my company, for AVE. It was a telephone call from Wildwood, he said. He asked me—

Q. What did he say, in substance, and what did you say?

Mr. Schoenwald: There has been nothing to indicate that Mr. Waters was an employee at this time of U. S. Overseas Airlines.

Q. What was the date of that call? A. That was late in May or early June; I think it was early June, 1951.

Q. What did he say and what did you say?

• • •

[431] A. I was told by Mr. Waters that he was working with some people that would be interested in dealing with AVE to take over the operations, and that he wanted me to talk to them, and they were going to send a plane over from Wildwood and pick me up in Washington so that I could talk to them.

So I told him that we were having a study or report made about AVE and until such time as that report was out I did not want to talk to anybody about this operation.

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[432] Q. Did he give you, did he send you any report [433] dealing with passenger matters? A. Yes, he did.

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[435] Q. Tell us what your instructions were to Messrs. Gotch and Crawford, briefly. A. I told them, I explained to them what the operation was. I told them I wanted a study of it. They wanted to know the history of the company and certain statistics. We had two meetings with Mr.—I had and Mr. Marshall had two meetings with Mr. Gotch and Mr. Crawford. And I gave them verbally, orally, all the information I could. And then they asked

for certain statistics which I sent them through my company in Caracas.

Q. Did they ask for any records which you did not furnish them? A. No, they asked—everything they asked for I could give them.

Q. The material you furnished them was prepared— [436] by Mr. Morgan, was it? A. By Mr. Morgan in Caracas, yes.

Q. What was his full name? A. His name was Henry Morgan.

Q. How long had he been with you? A. He had been with me about that time about a year, approximately a year.

Q. Was he a former employee of Price, Waterhouse? A. He was a former employee of Price, Waterhouse.

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Q. Did you have confidence in Mr. Morgan? A. I did, yes.

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[437] Q. Do you remember that in the early part of August several of the personnel from USOA came down to Venezuela? A. Yes, I do.

Q. Can you tell us who was in the party? Maybe you have done that. Can I refresh your recollection? A. Yes. I think I remember. It was Mr. Cox and his wife, Mr. Burger, Mr. Van Boheman, Mr. Waters, Mr. Clemett. I think that was all.

Q. I show you Defendant's Exhibit F for identification and ask you whether you received that on or about the date of June 15, the date that it is stamped? A. Yes, I received this.

Mr. Nickerson: I offer that in evidence.

• • •

[438] (Defendant's Exhibit F for identification received in evidence.)

Q. I believe, Colonel, that on your direct testimony you stated that you offered to show the books and records to USOA personnel. A. I did, yes.

Q. Did you have any conversation with them while they were in Caracas with respect to a Rome office in AVE? A. Yes, I did.

Q. Will you tell us what that was, briefly? A. I told them that we had an office in Rome that was near the office of TWA, 63 Via Barberini, in Rome, and that if they wanted that office I would be glad to make arrangements with them so that they [439] could have it.

I told them that I had had a previous arrangement with Mr. James Wooten about this office and about traffic generating in this office. They told me that they were not interested in having any kind of business with Mr. Wooten and that they thought that the maintaining of an office in Rome would be too expensive, too much overhead, and that they would advise me if they wanted the office. That is—

Q. And did you thereafter get any advice from them as to whether they wanted the office? A. Yes. I got a telegram, a telegram, yes, cable from Mr. Burger saying that they were not interested.

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Q. When was that, about? A. That must have been about the middle of August, about the middle of August.

Q. I will refresh your recollection on the date. It was after Mr. Burger went to Rome? A. It was after Mr. Burger went to Rome, yes.

Q. Did you have any conversation with them, with respect to turning over to them any equipment— [440] A. No.

Q. —in Caracas? A. No.

Q. Or any commissary materials? A. No, there was no conversation. When the plane went to Caracas it needed some commissary equipment; so I went to Chicago and Southern, whose manager was a personal friend of mine, and they let me have some commissary equipment which I passed on to the airplane so that they could make a trip.

Q. Did you turn over to them any blankets? A. Yes, some blankets and some pillows, and so forth.

Q. Did you ever get any of them back? A. No.

Q. Did you have any conversation with them in the early part of August with respect to any debt in Portugal? A. I don't remember.

[443] Q. Colonel, did you advertise the flight for August 15th? A. Yes, I did.

[444] Q. Was that flight canceled? A. It was canceled.

Q. Why was it canceled? A. The flight was to take off on the 15th, the morning of the 15th, and the airplane arrived late in the day of the 15th and it was not properly equipped at that time.

Q. Was the flight rescheduled? A. Yes, it was rescheduled for the 19th.

Q. Did it take off on that date? A. Yes, it did take off on that date.

Q. Did you thereafter get a cable—and if is already in evidence—dated August 22nd, Exhibit AI, from Mr. Cox urging you to go to Rome and that he was departing from Newark? A. Yes, I did.

Q. What did you do after you got that cable? A. After I got that cable I finished some papers I had to have for the naming of Mr. Mazzolini as immigration representative in Italy.

Q. I show you Exhibit AK for identification. Is that what you refer to? A. Yes, that is the document I have referred to.

[447] Q. When you got to Rome did you see Mr. Burger? [448] A. I saw Mr. Burger.

Q. Did you talk to him? A. I talked to him, yes.

Q. Will you tell us what he said and what you said, in substance? A. In substance, we talked about him having difficulty with the Embassy; so after I talked to the Ambassador I introduced him to the Ambassador.

Q. Introduced Mr. Burger? A. Introduced Mr. Burger to the Ambassador. After that we talked about different matters; we talked about something that had to do with the Alitalia thing, that he talked to Alitalia and Alitalia talked to him.

Q. What was your conversation with Mr. Burger about Alitalia? A. He said that the Alitalia people were opposing AVE going into Italy twice a week. So I explained to him that I had had that before and that we had never actually had any serious argument on that point, and since the last time we talked I told the Alitalia people, and had a friendly conversation, I told them, "If you don't want me to come here twice a week we will limit the number of passengers from [449] Caracas to Rome," which, apparently, which was not to their convenience, and the matter was dropped, and my recollection, is we might have brought it up again but it was never an issue.

Q. Just so I understand it, Colonel, how many stations did you have in Europe? A. We had four stations in Europe including Rome.

Q. So that your passengers in the Italy operation came from the four stations? A. From the four stations.

Q. The Alitalia ran from Rome direct to Caracas? A. Yes, sir.

Q. So that they had only the one station in Rome from which to take passengers out, is that right? A. That is correct.

Q. If I understand what you say, you told the Alitalia people that you had several stations to fill your airplanes up and if they made any trouble with respect to your two flights a week you would get your government to limit the number of passengers they could take out of Caracas; is that correct? A. That is what I talked to them, yes.

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[453] Q. Prior to the time that you got over to Rome did you have some requests from Burger to appoint a Mr. Mazzolini as legal representative? A. Yes, I did.

Q. Was that done by you when you got to Rome? A. Yes, that was done by me when I got to Rome.

Q. And was that done—was that under this [454] document AK for identification? A. Yes.

Q. Did you have any conversation while you were in Rome with Mr. Burger with respect to whether USOA did or did not want to take passengers from Spain paying in pesetas? A. Yes, from what I talked to him I understood him that they didn't want to take passengers from Spain. As a matter of fact, they left Mr. Waters in Madrid on the way back to set up a warehouse, bonded warehouse, to take cargo from other places rather than take passengers in pesetas.

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[456] Q. Do you recall how many passengers there were on the trip back on September 9th? A. On September 9th there were 25 passengers from Rome.

Q. Did you have any passengers from Spain? A. Yes; there were 12 passengers from Spain.

Q. Now do you recall whether you had any conversation with Mr. Burger while you were in Rome with respect to these 12 passengers in Spain? A. To my recollection, Burger did not want to take passengers in Spain but apparently later on he decided, if he did not have enough in Rome, to take passengers in Spain. That is my recollection.

Q. In other words, am I correct in stating that he said that if they had empty seats they would take Spanish passengers who were paying in pesetas; is that correct? [457] A. That is correct.

Q. And did you so inform the agent in Spain? Did you so inform the agent in Spain? A. That I don't remember.

Q. I will show you a letter dated September 8, 1951, and ask you if it refreshes your recollection? A. Yes, that is the letter, yes.

Q. Does that refresh your recollection? A. Yes.

Q. You did so inform him? A. Yes, I informed him.

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[459] Q. Did Mr. Burger, while you were in Rome, Colonel Marcano, express himself as to whether he was enthusiastic or not enthusiastic as to the potential of the operation, the AVE operation? A. He was very enthusiastic about the AVE operation. As a matter of fact, he and all the people that were working with him, I mean the pilot and the navigator, everybody in the office, crew people, they were all very enthusiastic, talked about the traffic in Rome, traffic in northern Europe, and even prepared a memorandum for going into northern Europe.

Q. Now during the time that you were over there did you at Burger's direction sign an interline agreement with Alitalia? A. Yes, I did.

Q. Which provided for the interchange of passengers? A. Interchange of passengers in Lisbon.

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[474] *Recross examination by Mr. Nickerson:*

Q. I show you Defendant's Exhibit AR for identification. Is that the interline agreement with Alitalia that you signed? A. That is.

Q. Are you familiar with Mr. Burger's initials? A. This is Mr. Burger's initials; yes.

Q. And Defendant's Exhibit AS for identification, was that prepared by Mr. Burger and Mr. Van Boheman? A. This was prepared by Mr. Burger and Mr. Van Boheman, yes.

Q. Did you thereafter send a translation in Spanish of Defendant's Exhibit AS to the Ministry of Communications? A. The Ministry of Communications in Caracas, Yes.

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[475] Q. You testified that Mr. Burger talked with the Alitalia people. A. Yes.

Q. Did you and Mr. Burger jointly talk with the Alitalia people? A. I talked with the Alitalia people when we were going to sign the agreement.

Q. Yes. Now, did Mr. Burger explain to you the nature of the agreement that he wanted to make with Alitalia? A. He did explain it to me, yes.

Q. Did he explain to you that he thought it was better for the company— A. That was his—

Q. —to have one trip a week from northern Europe and one trip a week from Rome? A. And joining them in Lisbon.

Q. Joining them in Lisbon and exchange passengers? [476] A. And exchange passengers.

Q. Alitalia would then go to the southern part of South America? A. South America.

Q. And you would take passengers to Venezuela? A. Or the northern part of Europe. It was going to work that way.

Q. As far as South America was concerned you would take them to Caracas, Alitalia would take them to the southern part of South America, is that correct? A. That is correct.

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Mr. Nickerson: I am going to introduce [477] these two documents when Mr. Schoenwald has had a chance to see them.

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[480] *Recross examination by Mr. Nickerson:*

Q. Colonel, you have been a resident of Venezuela for some time, have you? A. Yes; all my life.

Q. And are you familiar with the Public Works [481] Program of Venezuela? A. Yes, I am.

Q. And as a member of the government you were familiar with that? A. Yes.

Q. Are you generally familiar with the immigration into Venezuela? A. Yes, I am.

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[485] ALEJO DE CERVERA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

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[526] *Recross examination by Mr. Nickerson:*

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[528] Q. Could CAVE under the contract of August 8, 1950, hire personnel to perform certain functions for it in running its operation? A. Very difficult to say because mainly the contractor of personnel against the franchise has been transferred to United States OA, but at the same time—

Q. Go ahead, finish. A. At the same time CAVE has retained some rights of supervision and the proposition of personnel. I would say the right—

Q. Excuse me; I don't think you understood my question. I don't mean to cut you off. If you want to finish, go ahead. But I don't think you understood it.

Aside from the contract of July 25, 1951, leave that aside for the moment, could CAVE under the franchise, the contract with the federal executive dated August 8, 1950, hire personnel to perform any of its operational functions? Could it, for example, hire someone to sell tickets for it? A. Well, that is different. I was thinking of flying personnel. No, I don't think so.

Q. It could not hire an agent to sell tickets [529] for it? A. It is so particular a question that, really, the answer cannot be found here.

Q. Yes. Well, I am just asking you your opinion. Could they hire an agent to sell tickets for it; could CAVE hire such an agent? A. Honestly I can't say, but my guess is "No."

Q. Could they hire someone to establish a maintenance ase for them? A. Well, you can go, as well as I can go, rough the contractor.

Q. Could you answer the question to the best of your bility? Could they hire someone to establish a main- enance base or would they have to do all of their main- enance themselves? Under the franchise, the document ated August 8th. A. Under the franchise?

Q. Yes. A. I thought we were speaking of the second ontract.

Q. No. I am sorry. I am talking only of the franchise ated August 8, 1950. A. The franchise? Yes.

Q. Under what we have been referring to as the [530] ranchise, under that document could CAVE legally have ired someone to sell tickets for it? A. Yes.

Q. And could it have hired someone to establish a aintenance base? A. Yes.

Q. And do maintenance for it? A. Yes.

Q. Could it— A. We are under the assumption that he second contract is included for the moment.

Q. Yes. I am only talking of the contract dated August , 1950, which we are referring to as the franchise. Could t hire personnel— A. Yes.

Q. —to perform various functions? A. Yes, sir.

Q. Could it hire someone to train any of its personnel? . Yes.

Q. Could it hire someone to set up flying schedules for hem? A. Yes.

Q. Do you understand? [531] A. Yes.

* * *

[532] Q. Now, sir, in its operations in Rome, for xample, couldn't CAVE, under the contract of August

8, 1950, which we have been referring to as the franchise, hire a Roman company to establish a maintenance base for it? A. In Rome, I would say yes.

Q. And with respect to the training of Venezuelan personnel outside of Venezuela could CAVE under the franchise hire a non-Venezuelan company to perform that training, to give that training? A. It is still the same question. It is doubtful, because no rights and obligations included in [533] the franchise can be assigned. But I know what you mean, I know to which difference you are pointing out. It is a very subtle one.

Q. You have no firm opinion as to whether it could or it couldn't, then? Am I correct there? A. I would say the correct opinion is "No."

Q. But you are not sure? A. I am willing to admit that there are cases very difficult because we know—we all know the difference between, for instance, to hire a man to clean the window and to hire a company to send a man to clean the window. I know that difference. That is why I am trying to understand you and to follow you and to admit that there are possibilities. But the contract is very strict in its terms.

• • •

[534] Q. You mean you could be tolerant as to matters which are not of major concern— A. And a broad.

Q. Whereas matters of major concern CAVE would have to retain the right to control? A. Yes, exactly.

[535] Is that right? A. Yes.

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[539] *Redirect examination by Mr. Schoenwald:*

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[540] Mr. Schoenwald: I don't want to take the time of the Court with this unless the Court

feels that there is some doubt on this question. If the Court has any doubt on this I would like to have the witness compare article by article of the contract between the parties, the contract with—

The Court: If you feel that it is necessary for your case, but I don't feel that I should be called upon to express any opinion. I suggest that you ask your witness to prepare it in memorandum form and then perhaps Mr. Nickerson would agree that if he were called [541] his testimony would be in that sense, and you can offer it as an exhibit in lieu of his testimony.

Q. Would you have time to be able to prepare an analysis before you leave for Europe of the franchise article by article compared with the contract and indicate its violation? A. Yes.

Mr. Schoenwald: Mr. Nickerson, would you take such a document?

Mr. Nickerson: Is your Honor suggesting that I should do it? I am hesitant to do so because I think the cross-examination is significant, he has shown so much doubt.

The Court: We are going to take an awfully long time with this witness.

Mr. Nickerson: I appreciate that. And if your Honor suggests that I do it, I will.

The Court: Do you expect to call an expert on Venezuelan law?

Mr. Nickerson: Yes.

The Court: It seems to me that your rights would be amply protected by asking your expert to make any appropriate comments with respect to that very matter.

[542] Mr. Nickerson: I will accede to your Honor's suggestion.

• • •

ALBERT W. GOTCH, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

[543] *Direct examination by Mr. Nickerson:*

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[548] Q. Now, Mr. Gotch, can you give us from your experience any opinion as to whether there is a developmental period after an operation shuts down for several months?

• • •

A. Yes. It happens invariably. I think we have analogies in this country. There have been a number of strikes of some duration on some of the major [549] air carriers, for example, during which time much of their normal traffic deserted them and went to other carriers or didn't move at all. And we know from examining the traffic and economic results of those carriers after service was reinstated that it took them some period of time, perhaps a month or two, before they recovered to their prior position. The traffic had to be recaptured. And I think that is characteristic of any operation of this kind, a public service function, where service is suspended or shut down and the market be redeveloped.

Q. Now, Mr. Gotch, on pages 16 and 17 you made a forecast as to prospective traffic revenues. Could you tell us whether in making your forecast you base that in any part on the gross operating revenues for 1950, the net operating income for the year 1950, or the profit of 1950?

• • •

[550] A. No, we did not base our projections on the full calendar year results.

Q. What did you base it on? A. We base them on the seven months to which we have earlier referred. That is clearly stated on the bottom of page 16: "factors experienced during the seven months of 1950 have been applied throughout."

Q. In your experience of schedule operations, Mr. Gotch, could you tell us what the average loads are of a schedule operation over a year's time in order to make money? A. Yes. Among airlines as of today and as of the past few years the so-called break-even load factor, which is in effect a traffic load producing revenues to offset the precise costs of carrying that traffic, has ranged on the order of 55 to 60 per cent for most carriers. That means that between 55 and 60 per cent of the seats in all of the aircraft that they have operated over the year have been occupied.

Q. An average of that? A. An average. (Continuing) Have been occupied by paying passengers. Over 60 per cent they begin to make some money; and within the range 60 [551] to 70 per cent there is an opportunity to make a fair and reasonable return on investment. A rule of thumb figure for an air carrier at which he can make a reasonable return on his investment and at which load factor the public gets a good quality of service, in other words, there are usually sufficient seats to go around, produces a figure of about 66 to 67 per cent. In other words, two out of three seats filled would usually pay the operator a return on his investment and will give the public a quality of service that is acceptable.

Q. Now what is the highest load factor that a schedule operation reaches? A. Well, on individual flights they sometimes reach—

Q. No. I mean an average over the year. A. Well, it varies. Some of the carriers have been getting up to about 70 per cent on some of their operations. During the war, as we know, when we had priority traffic, it went into the high 80 per cent. But, of course, public service fell apart, as we all know. And immediately after the war that same condition prevailed; there was a large demand and there was an inadequate supply, and as a result the public got quite dissatisfied and abandoned airlines [552] as a matter of fact to a great extent; traffic fell off, and for several years the entire industry was in financial difficulty as a result of that.

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[553] Q. Does any carrier, Mr. Gotch, reach a 100 per cent load factor?

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A. No.

• • •

[561] Mr. Nickerson: Your Honor, I was reminded by one of my associates that I made a misstatement to your Honor yesterday, which I would like to correct, when I said that I did not think that certain documents would be in issue. I was thinking of the franchise and actually those related to the rights. And I did know that they were going to be in issue.

The Court: Very well.

• • •

[573] *Redirect examination by Mr. Nickerson:*

Q. Would you take a look at the report, Mr. Gotch, page 3, paragraph numbered 6. If I may: "As soon as AVE can establish schedule dependability, a satisfactory standard of passenger service, and conduct an aggressive promotional campaign, it should attain a 40 per cent passenger load factor on eastbound [574] flights and an 82 per cent load factor on westbound flights, on the basis of two schedules per week with a 50-passenger airplane."

Can you tell us from your experience why you considered schedule dependability, a satisfactory standard of passenger service and an aggressive promotional campaign necessary to attain those load factors?

• • •

A. Well, there are essentially two kinds of common carriage in the airline field; one is the so-called [575] scheduled, which is the normal certificated carrier, and the other is non-scheduled, which has been characterized as irregular carriage.

Schedule carriers must, under their certificates, perform a schedule operation; they must post their schedules and they must make every endeavor to adhere to them. They have to fly whether they have traffic or not.

That is not the case with non-scheduled carriers who do not have to adhere to fixed schedule; they may wait until they accumulate essentially a full load, a profitable load. It could take a day, it might even take a week, depending on circumstances. So that over the long pull they can attain a fairly high and profitable load factor. Whereas the schedule carriers are unable to do that because they must fly whether there is traffic or not. And

if they attain a 60 to 70 per cent load factor they consider they are doing quite well.

Mr. Nickerson: That is all.

The Court: This was to be a schedule type operation, was it not?

The Witness: Yes, sir.

The Court: And what do you mean by the [576] phrase "schedule dependability"?

The Witness: That means that they adhere to schedules fairly closely. Adherence to schedule is usually understood to be somewhere on the order of not more than 45 minutes late.

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[582] DANIEL C. COX, JR., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

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Direct examination by Mr. Schoenwald:

• • •

[603] Q. You were just telling us whether or not that plane was ever taken out of the company's control by Mr. Webb and Mr. Clemett.

Mr. Nickerson: Just to protect the interests of my client for the record, your Honor, may I object to all of this on the ground that Webb, it has been testified, was their employee, that this was long, long after the event and hasn't any possibly relevancy to the action.

The Court: Yes. Your objection is noted and you will reserve the right to strike, and I will overrule the objection for the time being.

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[610] Mr. Schoenwald: I read from the deposition of Mr. Fremont Burger.

• • •

[615] Mr. Schoenwald: No. 242 is the exhibit number of the tape recording.

Mr. Nickerson: I object to it, your Honor. It is a self-serving statement, report from one employee of United States OA to the other.

• • •

[616] The Court: Well, a great deal of this is self-serving and opinion and conjecture, a prediction of the future states of mind and other matters which would not be testified to even if Mr. Burger were here. And I have grave doubt as to the value of this as a matter of proof just from the standpoint of its probative value—

• • •

[617] The Court: I am not sure that I can consider it a communication within the terms of the shop book rule, because there are always collateral indicia which are necessary to establish the procedure or routine by which the communications are made. The postmark, for instance, the filing indications, perforations, and collateral documents of various kinds, all of which fit into a business system which show that they were sent in the regular course of the company's business and that it was the regular course of the company's business to keep such communications.

Now this is a very unusual procedure of a man making a recording of his own voice and then sending a record of that voice to somebody else. And it could open the shop book rule for a great deal of mischief I am afraid if a thing like this could be considered to be admissible as evidence in the case.

Mr. Schoenwald: Would your Honor perhaps be of a different view if we presented the covering letter with which it was sent and the envelope, if we can find it?

The Court: I might, yes.

Mr. Schoenwald: As well as some testimony perhaps by the person who opened the envelope? [618] That might mean recalling the—it might mean production of a witness who is in California who was the one at that time who opened and received the mail. I am wondering if Mr. Nickerson—

Mr. Nickerson: I won't put him to any such technicality as that.

The Court: If you will concede that this recording was sent by letter by one employee of this company to another in the regular course of their business and that it was the regular course of their business to keep a record of this conversation, I will admit it within the shop book rule, reserving, however, the right to consider only those portions which I think would be admissible as a matter of primary evidence because, obviously, somebody's feeling about the state of mind of somebody else would not be admissible.

Mr. Nickerson: I am afraid if I did that, your Honor, that under the shop book rule, Federal shop book rule, the fact that it contains hearsay does not make it inadmissible; it merely goes to the weight of it. That is my recollection of the statute.

The Court: That is so with respect to hearsay.

Mr. Nickerson: Yes. There are conclusions [619] also.

The Court: There are conclusions and there are statements here which go way beyond the restrictions about hearsay.

Mr. Nickerson: I don't want to put him to any technical burden that someone mailed it. I will concede that it was mailed over here. But I don't want to concede that it was the regular course of business, because this was extraordinary.

The Court: Would you concede that if he called this witness from California the witness would testify, in substance, that it was sent by mail and received by the company as part of its regular business, that it was part of the company's regular business to keep the communication?

Mr. Nickerson: Yes.

The Court: And that this communication was kept?

Mr. Nickerson: That it was kept there, but not —I won't agree that it was made in the regular course of business, but I would agree that it was received and kept in the regular course of business.

The Court: And that he would so testify.

Mr. Nickerson: And that he would so testify.

[620] The Court: Well, I think that that would

be a sufficient foundation now. I will note your objection to its receipt and give you the right to move to strike out later, and I will have it marked in evidence.

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(Plaintiff's Exhibit 242 for identification received in evidence.)

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[626] Mr. Schoenwald:

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[627] If your Honor please, we are having a little difficulty finding some of the material that we would like to read into the examination, and I think it would serve the function of this court and the interest of justice if we could read some of this material in when we have had an opportunity to put our hands on it. There are some sections that I know exist and my associate has been unable to find them; and I can't see how justice would be served by insisting that we sit here and delay while I look for these sections.

The Court: Well, could you go ahead with the case and reserve the right to move until he reads them in, Mr. Nickerson?

Mr. Nickerson: Yes.

The Court: I don't know when we are ever going to get through, but we are always interested [628] that substantial justice is done.

Mr. Nickerson: All right. I will accede to your Honor's suggestion. I will call Mr. Russell.

JOHN S. RUSSELL, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

* * *

[629] Q. Yes. A. The meeting was to discuss the means of making an agreement between USOA and AVE work.

* * *

Q. Hold Defendant's Exhibit N before you (handing). A. There was discussion as to the reasons why USOA had ceased to fly its aircraft. I directed the attention of it was, I believe, Mr. Jones and Mr. Cox to the existence of Defendant's Exhibit N and stated that [630] this was a binding agreement and wanted to know why the USOA was not performing.

Mr. Cox stated that they were not going to perform unless they had full loads.

Mr. Jones stated that the agreement was no good; the only way to make it work was to tear it up and start all over again.

I told Mr. Jones and Mr. Cox that I thought the agreement was good and that we were here to see whether we could work within the framework of the agreement and we had no intention of tearing it up and starting all over agajn.

There was considerable discussion about the fact that Mr. Cox's airplanes or USOA's airplanes were not getting enough passengers. Mr.—

Q. Did Mr. Burger say anything at this meeting? A. Mr. Burger did. Mr. Burger said on many occasions—it was a rather lengthy meeting, it was in two sessions—

that the problem was not one that was basic to the agreement but one that was temporary.

I recall asking Mr. Burger specifically what was necessary to develop the business.

He responded that the problem was lack of promotion.

[631] We had quite a bit of discussion as to what was necessary to promote. And he concluded—or he stated that about $60,000 of developmental expense was needed.

That was about the substance of the morning meeting. There was a lot of other discussion going to matters that usually go on in meetings of airline people.

Q. Did Mr. Burger express himself at that morning meeting as to whether he was enthusiastic or not enthusiastic as to the potential of the operation? A. Mr. Burger at all times during that morning and later was extremely enthusiastic about the opportunities of this route.

* * *

[632] A. We reconvened about two o'clock.

* * *

[634] I then brought up a second point. There was an aircraft scheduled to leave Rome that night. I asked Mr. Cox whether that flight was going to go out on schedule.

Mr. Cox said, "You will have to get that from Mr. Jones."

I asked Mr. Jones the same question. And Mr. Jones said, "It will go out."

And I believe that is all of the substance of that meeting.

* * *

[635] Q. Will you briefly describe how you happened to call Mr. Cox or he called you and what in substance

both of you said? A. I had a call from Mr. Marshall about—

Q. Don't tell us what Mr. Marshall said. A. As a result of that call I first tried to call Mr. Dougherty but not reaching him I called Mr. Cox.

Q. This was Sunday, the 16th? A. This was Sunday morning, the 16th. I asked Mr. Cox—strike that.

I told Mr. Cox that I had been informed that the aircraft that was scheduled to have left Rome for Caracas had not in fact left Rome for Caracas but had been pulled off the route and had been taken into Germany that night. I asked Mr. Cox whether that was true. He admitted that it was true.

I told him that I had heard that he had stranded 14 or 15 passengers. And I asked him whether that was true. He made some remarks about the passengers. I believe—no; excuse me. He said, "I told you yesterday we don't fly until we have enough passengers or full loads." I don't recall what he said in that particular point.

I then said, "Well, what about our agreement of [636] yesterday?"

Q. Did he say anything about passengers in Spain? A. Yes, he did. He said that eight of the passengers I believe were from Spain and that they only paid in pesetas and he didn't have any desire to take passengers out of Spain if they paid in pesetas.

I asked him about the agreement of yesterday and what effect this had on the agreement.

I think he then told me that he was not going to speak to me but I should speak to his lawyer.

I told him that I thought this was a very important matter and that I was frankly very shocked.

Q. Did you tell him you tried to get hold of his lawyer? A. Yes, I did. And that I was going to do everything I could do to protect my client's interest if that was the way he was going to act.

Q. Now subsequent to that time, Mr. Russell, did you at the request of either Colonel Marcano or Mr. Marshall make any investigation into the market for DC-4s? A. Yes, I did.

Q. And did you speak to anyone relative to [637] purchasing any DC-4? A. Yes, I did.

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[638] Q. Now, will you first give us the approximate date of this conversation? A. Well, it was right after the weekend. It would be Monday, the 17th.

Q. Will you tell us what was said, in substance? A. I telephoned the president of U.S. Airlines, a certificated cargo carrier that operated in the eastern part of the United States, a man by the name of James Wooten. I told him the background, the purpose of my call, and that AVE had an option to purchase two aircraft and if we could exercise the option would he purchase the aircraft. He agreed that if we could get title to the aircraft he would purchase them for [639] $600,000 apiece.

Mr. Nickerson: Your witness.

Cross-examination by Mr. Schoenwald:

Q. Is this Mr. James Wooten the same James Wooten who was declared a bankrupt and who was subsequently imprisoned for embezzling trust funds in connection with the U.S. Airlines? A. I have no information on that. I would be very much surprised if he was.

Q. The U.S. Airlines is defunct now, isn't it? A. I don't know whether it is defunct. It doesn't operate.

Q. But it is bankrupt, isn't it? A. A petition in bankruptcy was filed, but after Mr. Wooten left the presidency.

Q. You are familiar with the facts. It was bankrupt at that time, wasn't it? A. I am familiar with the facts. And it was very much not bankrupt at that time.

Q. Mr. Wooten, as a matter of fact, had sold one of the airplanes that the Colonel operated with just prior to the interest of USOA in this company for $220,000 hadn't he? A. I don't know.

[640] Q. Mr. Wooten was president of Near East Airlines, was he? A. Yes, he was.

Q. You knew that Near East sold an airplane to the Colonel for 220,000 about nine months before? A. No, I don't, as a matter of fact. I am perfectly willing to take your statement that that is so.

Q. Did Colonel Marcano tell you or did Mr. Marshall tell you that he had heard a conversation between Mr. Burger and Mr. Webb in which they were planning to take the bill of sale out of the safe of USOA relating to the airplane that was involved in this operation?

Mr. Nickerson: Can you fix the time?

Q. Well, shortly before or during the progress of the conference, did it not come to your attention that the Colonel had heard a conversation between Mr. Burger and Mr. Webb with respect to taking the bill of sale out of the safe? Either from Mr. Marshall — A. I have of course heard it, Mr. Schoenwald, but, I can't place it in my mind whether I heard it as part of the preparation of this case or whether I actually did hear it prior to

September 15th meeting. My recollection is that I did not.

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[644] Q. Now did you know whether or not Mr. Wooten had a million dollars in cash free and clear and available to pay for this airplane at the time he spoke about buying it? A. Mr. Wooten had to my knowledge just become president of U. S. Airlines with an entire new group of backers. Because of other professional arrangements I knew that the group of backers were people of very substantial means and I believe that they had the money.

Q. Mr. Wooten is a regular client of yours, isn't he? A. Mr. Wooten has never been a client of ours.

Q. He hasn't been a client of your firm? A. Never.

Q. He is a regular visitor to your office, isn't he? A. I don't think Mr. Wooten has been in our office a half a dozen times in the last ten years.

Q. You have participated in the recent insolvency proceeding, haven't you? [645] A. I don't know that Mr. Wooten has ever been through an insolvency proceeding.

Q. The U. S. Airlines recent insolvency proceeding. A. No, we didn't—oh, I beg your pardon. We may have represented a few claims that were filed, yes.

Q. Didn't you also participate in the preparation of the lawsuit of Near East Transport, Mr. Wooten's firm, against Colonel Marcano? A. No; we represented Colonel Marcano.

Q. You participated in the settlement, didn't you? A. Yes, on behalf of Colonel Marcano.

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[647] JOHN PAGE MARSHALL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

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[649] Q. Now prior to the printing of Plaintiff's Exhibit 357, the study of Gotch & Crawford, did you have any communications from USOA? A. I did.

Q. Will you tell us the substance of those and who spoke to you? A. On or about June 12th I received a telephone call from a Captain Bush—I don't know what his relationship with USOA was—and he asked me—

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[654] Q. All right. Then will you tell us what happened after that, what was said and who said it? A. After that, after they had finished I think the next discussion was actually from me when I said, "Now we want to know the basic requirements for the establishment of this service. The equipment requirement is for two DC-4s. We also—we will have to be [655] adequately prepared organizationally speaking." I recall my comment as having been, "Gentlemen, your operation to this time has been unlike the operation that we are now discussing. You have been engaged in an irregular operation, whereas this is a schedule operation. There will be capital required to develop the traffic to recaptivate the operation." Capital—I told them on the order of 200,000 in my unqualified judgment or my guess was that they—that I wasn't prepared to spell out exactly what the 200,000 would be required for. There was a query to that when I said 200,000. I told them I didn't know exactly how

it would be allocated but that it would be a conservative amount of money. I told him that they would have to equip their operation with personnel, and I mentioned specifically traffic personnel.

The Court: What kind?

The Witness: Traffic, sir.

Q. What are traffic personnel? A. That would be people who are trained and competent in the development of traffic for a schedule common carrier operation.

Q. Development of accounts? [656] A. That is correct. Specifically, what I had in mind —

Q. Don't tell us what you had in mind. Just say what you said to them and what they said to you. A. I am sorry. They advised that they had five DC-4s and three DC-3s in response to my statement that they would need two DC-4s. I made some query at that point as to the present equipment of the aircraft, whether they were equipped with seats or were being used for cargo operations, and they advised that they had some of each, as I recall it; in any event, that they had passenger equipped DC-4s.

When we discussed the financial requirement I asked if they thought that that was available to them, and he—Mr. Cox said, "We have, as we have told you, five DC-4s and three DC-3s. We are paying our bills." And he laughed.

He said, as to the traffic—discussing the traffic situation mention was made of the fact that he had already some preliminary communication with Mr. McDonell; I believe he said he was then employed and had been for some 17 years by American Airlines in traffic, in public relations work.

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[658] Q. Did you say whether or not you had been over the AVE route? A. I specifically told them before we went into, very early in the discussion that I had never been to Venezuela, and I had not been associated with Colonel Marcano at the time that AVE was in active operation previously and that the only information that I had was contained in the report.

• • •

[658-A] Q. Did you or did you not at that meeting make any suggestion to USOA as to what proposal they should make to you? A. There was discussion on that. Burger said—

[659] Q. Will you tell us in substance and briefly what that was. A. Burger said, "What have you in mind," as to the form of the deal, I think the expression was.

My answer, in substance, was that the report, Gotch & Crawford study, the last two pages of that contained a suggested partial outline which they could accept as indicating our thinking, but that it was not binding, that actually the matter of entering into a contract for this operation, their approach to that, it was a competitive thing, that we had circularized the operating industry with the reports, the Gotch & Crawford study, and I thought the best approach for us was to let each interested party submit their proposal, drawn in any fashion they wished, and that we would then consider them and take that which was most advantageous to us.

Q. Did you thereafter receive Defendant's Exhibit G?

Mr. Nickerson: That is the letter, your Honor, of July 19th.

A. I did.

Q. Was any part of that dictated by you or suggested by you to USOA? [660] A. Paragraph two may have been. It is only one sentence, if I may read it.

Q. That is the one that refers to U. S. registered aircraft under lease to AVE. A. Then I would not have suggested that. That wasn't mine. I am sorry. I did not suggest that.

Mr. Burger made some inquiry as to the matter of whether American crews could be used, and I told him that I thought that Venezuela—they required Venezuelan crews after a time. So I may have suggested point five.

Q. Yes. What I am getting at is did you suggest the substance of what is in the July 19th proposal or was that something that was suggested by USOA independently of you? A. I did not suggest this outline.

Q. Was that delivered to you by hand or by mail, if you recall? A. It was delivered to me by hand.

Q. Who delivered it? A. Mr. McCormick and Mr. Burger.

Q. Did you have discussions with them at that time? A. Of a limited nature.

[661] Q. Did you thereafter study the July 19th proposal? A. I did.

Q. Did you then call Mr. Cox? A. I did.

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[667] A. May I correct a misstatement that I have made pertaining to a date?

The Court: Yes.

A. I have stated, I think, that reference to the specific date for starting this operation did not occur at the first meeting. I was in error. The reference to the date did

occur at the meeting but not at the point in the discussion we were in a while ago. It did occur at the first meeting.

Q. Tell us in substance what was said about that, briefly. A. At the very end of the meeting as they were leaving, we got back to the matter of the urgency of reactivating the operation, and I asked Mr. Cox when he could start the operation if a contract was entered into with him.

He said—well, we talked about that quite a bit, and it was realized that it was a matter of weeks rather than months, and he said, "Well, possibly by August 10th and certainly by August 12th."

Q. All right. Going back to the July 25th meeting when you showed them— A. May I add one thing to that?

[668] Q. Yes. A. I questioned Mr. Cox on whether that was too short a time and explained to him that if a date was established to start this operation and that we then failed to do so, that we would, in all likelihood, be in very serious difficulty with the Venezuelan authorities, since they perhaps were extending themselves to allow us a chance to get it reactivated under any circumstances and that we would have to advertise this thing to reactivate the service and that we would have to abide by whatever date we notified them that service would be started and that we would advertise the thing.

Mr. Cox said, "Well, Mr. Marshall, it has been our business to conduct operations all over the world on short notice."

Q. Going back to the July 25th meeting when you presented Defendant's Exhibit M to USOA personally, was there any discussion of any change in that draft, and examine Defendant's Exhibit N, if you care to, which is

the final contract. A. These are changes from the second draft to the so-called final draft?

Q. Yes. [669] A. At paragraph (f).

Q. 1(f)? A. 1(f). I am sorry.

Q. Yes? A. There was a change in that the draft provided that USOA was to pay CAVE $1,500 per roundtrip flown with a minimum guarantee of $3,000 per week.

Mr. Cox said that that seemed perhaps a little rough on them, since it would take time to get the operation started again, that there might not be occasion for two operations, that this, as he read it, would obligate them to pay a minimum of $3,000 a week from the very beginning, and that he thought that that should be relaxed to recognize a period for reestablishment of the operation, during which perhaps only one plane would be required and that in any event he could not send a second airplane down immediately.

Accordingly, the contract was written to provide—to remove the guarantee of $3,000 per week for a period of 60 days.

Q. So that it would start after 60 days, $3,000? A. That's correct.

The Court: And there would be nothing in the meantime?

[670] The Witness: Yes, sir. In the meantime they would pay $1,500 per roundtrip actually flown.

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[674] The Court: Before answering that, will you please indicate what the words were that were added as a result of Mr. Cox's objection.

Mr. Nickerson: "As defined in this agreement."

The Court: Let Mr. Marshall answer that.

The Witness: The words "as defined in this agreement" were added, and I agreed with Mr. Cox's question to me as to whether in my opinion that would mean that the term of the contract, being for one year, would be included in the "as defined in this agreement" and that accordingly the action would be not binding after the term of a year.

Mr. Schoenwald: With respect to what this witness said, "that would mean," I request that it be stricken.

The Court: I take it that you are referring to a conversation which took place with Mr. Cox—

[675] The Witness: Yes, sir.

The Court: —immediately before this form of words was adopted.

The Witness: That is right.

The Court: I will take it.

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[677] Q. In the discussions that you have referred to in your testimony with the USOA personnel, did they at any time make any statement that they would fly only if they got full loads? A. Absolutely not.

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[678] Q. Will you refer, Mr. Marshall, to certain meetings which you have testified to that took place in the middle of September 1951.

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[681] Q. Can you tell us the substance of that meeting, who was there and what was said? A. I neglected one thing, if I may, in the first meeting. At that meeting Mr. Burger was present and he had some considerable volume of paper, large sheets, and textual material, and

he endeavored to preva.. upon Mr. Cox to consider the requirement for [682] conducting the schedule operation.

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[693] *Cross-examination by Mr. Schoenwald:*

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[708] The Court: Mr. Schoenwald, I am afraid that you are taking a little bit of the attitude of an attorney for an infant suing a trustee, and you are not in that protected position here. You are representing a businessman trying to make money, who was dealing at arm's length with another businessman, who was also trying to make money, and you have got to understand the issues of this case in that light.

Now I do not regard your argument as having any validity because I think that you relied upon several things, not only what was in the so-called prospectus, but upon the investigations made by your own clients upon what they considered to be the weight to be attached to various intangibles and illusive considerations. The future business, for instance. Nobody can predict with certainty what is going to [709] happen in the future on anything, let alone transportation of passengers. And the manner in which you are attempting to explore everything that should have been told to your client, leads me to believe that you are laboring under the illusion that your client was in the nature of a ward or an infant, and that people with whom your client was dealing were like trustees or fiduciaries —in fact, you have made the allegation that they had a fiduciary duty which they breached.

Mr. Schoenwald: After the contract.

The Court: I am unable to understand what that is so far. I don't see what the basis for it is in this case. I see one reference in a letter to the term "partner," which I don't think is sufficient to enable you to make that argument. But up to this point you are not entitled to take or to claim the right to pursue your adversary as though they had the duty of a trustee toward a ward. They are two businessmen dealing at arm's length, that is what they were, and they entered into the contract, a contract which I have no hesitancy in saying was loosely drawn and which had all kinds of safeguards and provisions which might have been put into it which [710] were not, and there were all kinds of things about this prospectus, in my opinion, which indicated that this company was stumbling and faltering, if not in a condition of very serious financial difficulty, and in that atmosphere I don't understand how you can pursue this.

Mr. Schoenwald: Your Honor, I think this is a question that relates to the remainder of the testimony, and it is of some importance.

The Court: Well, put a question. I will give you an opportunity to argue the law and to summarize the evidence later. Put a proper question. I have been trying to help you and guide you along constructive lines in giving you the benefit of what I thought were tentative views, and I can deal with it better if you will put a fresh question and we will go on from there, because I think your important task now is to get the testimony and the proof complete.

* * *

[734] *Redirect examination by Mr. Nickerson:*

Q. Mr. Marshall, you testified with respect to a meeting of yourself, Colonel Marcano, Mr. Burger and Mr. Webb. Can you tell us in substance what was said in that conversation? I believe you testified it was sometime in September, prior to the time you saw Mr. Cox. A. Yes, sir. It was on the morning of September 14th that I went to the Lexington Hotel at approximately ten o'clock in the morning and met with Colonel Marcano and Mr. Burger, who were having breakfast. Colonel Marcano mentioned that there were some very strange things going on and that USOA was endeavoring to take their airplane out of AVE's operation, and he [735] suggested that Mr. Webb was coming there and that we go up to their room and discuss the matter, and Mr. Webb did come and he told me the first complete detail on the thing, which was that Mr. Cox had sent him, Mr. Webb, to Caracas—

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Mr. Schoenwald: I think what the witness is testifying to is not what our man said but what Colonel Marcano said our man said.

The Witness: No.

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[736] Q. Don't tell us of any conversation you had alone with Colonel Marcano. Tell us only of the conversation you held when Burger, Webb and Colonel Marcano were present. A. Yes.

Q. Continue your answer, will you. A. As I say, Mr. Webb said that he had been sent to Caracas by Ralph Cox to take the airplane to Bermuda on the next eastbound trip, to get the transfer—to transfer the pas-

sengers if possible to BOAC, but in any event to return the airplane to the United States.

He said that upon his arrival in Caracas that he had been approached by Mr. Burger and Mr. Burger met the airplane when he came in and that he had disclosed to Mr. Burger his instructions, that Mr. Burger had prevailed upon him not to do so and that Mr. Burger and himself, Webb, had then made an arrangement with the pilot of the aircraft, whose name was Campas, to not move the aircraft for any purpose except under instructions accompanied by the word "Burweb" a code word—I am sorry, should not have used it—at that time I didn't learn that it was Burweb, until later.

[737] Mr. Webb then said that he was very tired; that he had been down to Wildwood and that—he laid down on the bed and said that he wanted to talk over the operation. He said, "I think we can take over this operation." He said, "I own half of that airplane—I mean, I own 25 percent of it and Clemett owns 25 percent." He said, "Cox has transferred the airplane to USOA without leaving us any evidence of our ownership. It is now, according to registry, owned by USOA."

Then he said, "I think that we can get that airplane." He said, "I have a friend of mine in Florida who has a DC-4 and who is a very close friend, he has offered to make available to me up to forty thousand so that I will have two aircraft and capital to undertake AVE's operation."

Well, Colonel Marcano said no, that we wouldn't entertain consideration or not enter into a discussion or consideration of the operation of AVE by anyone else. Then I mentioned—

Q. Anyone else other than who? A. Well, he may have said USOA. I stressed the fact that of course we had an agreement with USOA and that our whole effort would be to make that work [738] and that we wouldn't talk to anybody until that was definitely out of the picture, and I suggested that Mr. Burger return—Mr. Burger and Mr. Webb return to Mr. Cox's office—they told me that they had been in touch with him—and determine what Mr. Cox's plans were, and that Colonel Marcano and I would remain there until we received word from them. We did receive word not less than a hour later, and Mr. Cox was ready to talk to us.

Mr. Nickerson: That is all, your Honor.

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[781] Mr. Nickerson: Would your Honor want me to read in some questions from Burger's deposition before lunch? It may be fairly rapid.

The Court: Yes.

Mr. Nickerson: Page 5.

"Q. What, in substance, were the discussions that you had?"

And may the record show and counsel concede that that was discussion between Burger, Cox and Waters.

"A. Mr. Cox evinced an interest in it. We had a chap in our employ, Dave Waters, who had been formerly with AVE and we asked him a lot of questions about their previous operation, potentiality and the possibility of our participating in such an operation. The discussion was very general at this time.

"Q. As a result of those discussions, did Mr. Cox [782] become interested in it or had he been interested before?

A. I think that his interest was a result of those discussions, by and large. I don't think that he was acquainted with the situation too much before.

"Q. Did he participate in the discussions with Waters and by 'he' I mean Cox? A. Yes, to some extent. Principally, I asked Waters mostly about the AVE operation, what transpired before.

"Q. Can you tell us the substance of what Waters said about it? A. He said that in his opinion he thought there was a good potentiality there, that they had never realized it before. He said that they, operationally and business procurementwise and all of those things—it hadn't been a good operation, and he mentioned a lot of the personalities that were in the deal; who they were I don't know, I don't remember the names. There seemed to be an arrangement between Wooten and Prescott and Colonel Marcano, and then there were certain involved situations among them. Those were the points that he brought out principally."

Page 7, second question:

[783] "Q. Could you tell us in substance what your discussion was?"

This refers to discussions between Mr. Cox and Mr. Burger prior to the time they saw Mr. Marshall.

"A. It would be very general at this point. We didn't know the people who were involved in it. We were merely under the supposition that it would be available. We were definitely interested in it. We wanted to determine on what basis if any we might get into such an arrangement."

Page 8, third from the last question:

"Q. When you received Plaintiffs' Exhibit 1,"—that your Honor, I will refer to as Plaintiff's Exhibit 357; it is the Gotch & Crawford study—"did you examine it? A. I didn't have an opportunity to. We were in an operation in the North Atlantic at that time, and I was pretty busy.

"Q. Did you ever get a chance to examine it? A. This was turned over to Mr. Cox principally. He was the one that looked it over.

"Q. Did you ever get a chance to examine it? A. Only superficially."

Page 40, the first question, and this refers [784-5] to a conversation with Colonel Marcano in Caracas:

"Q. Did he mention"—he meaning Colonel Marcano—"anything about the Rome office being involved in a dispute with Mr. Wooten? A. No—that came up, yes, there was a discussion about that.

"Q. What was that? A. Colonel Marcano said that after we had time to go to Rome and look at the Rome office and decide whether we should wish to keep it or not, we should let him know. But whether Jim Wooten was in the deal at that time was not discussed, I don't believe; at least not in my presence it wasn't.

"Q. What did you and Mr. Cox say to that? A. It was on the basis of let's look it over. He told us of some of the expenses that he had had in connection with the Rome office and we indicated that we felt that it was too much, that we didn't think we could handle that, but we would still look at that and advise him. That was one of my assignments."

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[786] WILLIAM C. WOLD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

Q. Mr. Wold, will you tell us what business you are in? A. I am a partner in an aircraft sales firm, transport aircraft sales firm.

Q. Will you tell us something of your background in aircraft sales? A. Well, I worked for Consolidated Vultee for a number of years. I worked for them about ten years; the last four was primarily in transport aircraft sales work.

Q. What years were those, about? A. That was up until April of 1949 when I started this present business that I am in.

Q. Where were you before you were with Consolidated Vultee? [787] A. Well, I was in the U. S. Signal Corps for a year, and before that I graduated from college.

Q. Where did you go to college? A. M.I.T.

Q. What kind of degree did you get? A. Aeronautical.

Q. In your present business, what is the nature of that business? A. Transport aircraft sales. We are specialists in that field.

Q. Would you describe yourselves as brokers? A. Yes; we do primarily brokering and occasionally dealing ourselves.

Q. And in that connection were you familiar as of September 15, 1951, with the market price of DC-4 aircraft? A. Yes. That is part of our business.

Mr. Nickerson: May it be conceded that Defendant's Exhibit BB for identification represents the

time on the aircraft, the two aircraft involved, and the engines thereof?

Mr. Schoenwald: Yes.

Q. Now holding Defendant's Exhibit BB for identification and assuming that the two DC-4 aircraft [788] referred to therein, DC-4-E's, were in proper fitness for flight as of that time, can you give us an opinion as to the market price on that date, September 15, 1951? A. Yes. In my opinion aircraft such as that would have had a fair market value of between 600 and 625 thousand dollars.

Q. Could you tell us on what you base your opinion? A. Well, I base that on our records of aircraft sales and known sales of comparable transport aircraft.

Q. Did you have sales that you were aware of on or about that date? A. Yes. Sales that we were aware of and also sales that we actually made ourselves. I can give you some examples if you want.

Q. All right. Will you do that? A. In October 1951 we sold an aircraft ourselves. The actual—

Q. DC-4? A. DC-4, yes.

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[789] Q. What was the price? A. Well, the actual price of the aircraft sold was $615,000. Now, the aircraft was not comparable to this aircraft, as far as its type of interior and so forth. Had it been, in my opinion it would have sold for about $660,000.

Q. You are assuming—I should have put that into the hypothetical question—a passenger interior recently renovated? A. Yes. In other words, every transport aircraft

sale is not of an aircraft that is identical to a previous sale or a future sale. There are variations between them.

But trying to compare the aircraft actually sold with the type of aircraft that you have in mind, in my opinion that would have sold for $660,000. That was in October 1951, an aircraft that we sold ourselves.

[790] Now in June of 1951, we did not make this sale but we know of this sale through our records, of a DC-4 to Pacific Northern Airlines; actual sales price of this aircraft was $500,000. In our opinion had it been comparable to this one it would have sold for about $525,000 to $530,000 in June 1951.

Now in October—

Q. Was the market going up? A. The market trend was rising sharply.

Q. Do you know what the reason for that was? A. Well, the reason, I think the international situation in the world had a lot to do with it, plus the fact that airline traffic was rising.

In October 1951, again, there were two aircraft sold, which were not our sales, and they were bought by Seaboard & Western Airline. And in my opinion had they been comparable to this aircraft they would have sold for between 645 and 650 thousand dollars.

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[791] The Court: How old were the two planes represented by Exhibit BB which you would sell in 1951?

Mr. Nickerson: I am not sure, but maybe the witness can tell us from the aircraft total [792] time.

The Witness: Well, you can't tell the age in time.

Q. You can only tell the extent of its use? A. You can tell the extent of its use, yes. And the total extent of the use of an aircraft and its chronological time has not, has not been over the past good many years, has not been the significance in its value in comparison with its time since overhaul and the supply and demand situation in the market, because we have sold DC-4s as high as $750,000 after they had been completely written off on the owner's books, and the original aircraft cost about $300,000. We did that in the case of National Airlines DC-4s.

Q. In what year? A. That was in, I think that was in 1952.

Q. Was that due largely to the Korean War situation? A. There is no question that that had an effect on the market situation. But airline traffic has been growing steadily all during that period, which also had its effect.

Q. What is the significance of the initial [793] "E" next to "DC-4"? A. The "E" is a model designation. It designates a later model according to the Army and/or the Air Force and Douglas dimensions, and it also indicates the type fuel system. For example, DC-4-B was originally built only with a 2800-gallon fuel system. DC-4-E model had a 3600-gallon fuel system.

Q. When did DC-4-Es become obsolete, if they were? A. They are a long ways from obsolete today, sir. They are selling now for pretty close to $700,000 range.

Q. You say they are selling now for $700,000. Does that mean new, delivered by the manufacturer? A. No, sir. They are not in manufacture, and they have not been in manufacture since—I think the last ones were manufactured in '46. We are talking entirely about used aircraft.

Q. How do you determine the obsolescence of an aircraft? A. Well, obsolescence of course is created every time a new model comes out. In other words, the DC-4 became relatively obsolescent when the DC-6 model came out, which was pressurized; the [794] DC-4 is not pressurized. But it doesn't become obsolete from the standpoint of being a good serviceable useful money-making airplane for the airline as long as the traffic, the airline traffic, creating demand for that aircraft is increasing at a greater rate than new aircraft are being produced. And that is the situation we have had in this industry for the last five or six or seven years.

Q. Then on that basis the DC-3 would not be obsolete today, would it? A. Not by a long shot.

Q. The DC-3 has not been manufactured for many years? A. You are absolutely right; and the DC-3 sells today for more than it sold new.

Q. Would it be your testimony that a DC-3 is not obsolete today? A. Not by a long shot.

Q. You say it is not obsolete? A. I mean that it is nowheres near obsolete.

Q. In other words any airplane which is commercially exploitable in your opinion is not obsolete? A. That is right. You would have to get into [795] a very careful definition of what you mean by "obsolete." If you mean as a vehicle for carrying passengers and performing airline service and making money, it is nowheres near obsolete.

Q. Well, let me put this final question to you: I take it you would not agree that the cessation of manufacture of a model is tantamount to the beginning of its obsolescent period? A. I am afraid, to be absolutely honest

with you, Judge, I would have to have an expanded definition of what you mean by "obsolete."

Q. I am suggesting that if an airplane model is no longer manufactured by its manufacturer and the manufacturer ceases definitely and irrevocably the manufacture of that model, to the extent of pulling out any of the special machinery used, taking it off its drafting board so that there is no longer any equipment or machinery for the purpose of manufacturing, I am suggesting that that, ipso facto, creates a condition of obsolescence for that airplane? A. Well, I will answer that by saying that it does only relatively.

Q. All right. I get the point. A. Because actually if the manufacturers [796] have not been producing or did not foresee a traffic growth which was going to create a supply and demand situation for those aircraft after he stopped manufacturing them, that would bring their business way up, far above, what he was selling them for. It simply means I think that the manufacturer felt that it was obsolete too soon.

Q. Was there a very lively market in 1951, September, October, 1951, for used DC-4s? A. Well, I would hate to use the word "lively" because—

Q. Active, reasonably active. A. It was a reasonably active market. In our industry the numbers are pretty small and the movement of aircraft is not so frequent that you can refer to it like you do the stock market activity. But it was increasing, and the pressure of demand was definitely beginning to show.

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[797] *Cross examination by Mr. Schoenwald:*

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[801] Q. I will ask you the next question: As a matter of fact, did you own those airplanes that sold for $415,000 each in October? A. That wasn't a sale that we made ourselves. I mean, that is a sale that is of record that we know of.

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[804] Mr. Nickerson: May I call on the plaintiff to produce the material that I previously asked them to produce, namely, the specifications with respect to the USOA aircraft, that I called on them for that about a week, more than a week ago?

While Mr. Pollak is finding that:

Redirect examination by Mr. Nickerson:

Q. Will you explain the difference between the $415,000 figure that you referred to and the $615,000 figure? [805] A. In the case of the Seaboard & Western Airline?

Q. Yes. A. Well, these records are at my office. But this is based on the fact that the aircraft were taken with a lot of equipment lacking, or things not done, which are ordinarily included or done by the seller which the purchaser was going to do which accounted for the reduced price. But for purposes of evaluation and comparison, had the seller done all those things and equipped the plane that way, why, then, the value would have been $640,000 to $650,000.

Q. What was the kind of equipment that wasn't on that? A. For example, if I remember correctly, on this aircraft the engines were not included. That is one thing. Engines would be about eighty thousand right there.

Q. Can you take a quick look at this and see whether—are you familiar with it enough to do it? A. Yes, I think so. This is the aircraft?

Q. This is what has been produced as the [806] detailed information about N-90436, which is one of the aircraft. A. Approved for return to service.

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Mr. Nickerson: I am continuing to read from Mr. Burger's deposition, your Honor. Page 52.

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[807] Mr. Nickerson: And it is referring to the Rome landing rights.

(Mr. Nickerson read from Mr. Fremont W. Burger's deposition as follows, beginning at page 52:)

"Q. When did you obtain those landing rights? A. We obtained them within approximately three days after my arrival there.

"Q. Approximately the 20th of August? A. I would say approximately, yes, sir."

Mr. Nickerson: Page 64. This also refers to when Mr. Burger was in Rome, if your Honor please.

"Q. And after the time that you saw Colonel Marcano talking to the Venezuelan Ambassador, did you receive friendlier treatment from the Venezuelan Embassy? A. After Colonel Marcano's arrival there, I had no further contact with the Venezuelan Embassy and any contacts that were made with those people [808] were either made by Mr. Cover, Colonel Marcano or Mazzolini.

"Q. Do you know whether those contacts were friendly after that time? A. I wasn't summoned to the Embassy any more nor were we bothered in any way by the Venezuelan authorities."

Page 75, second question:

"Q. What was Marcano doing during that time, do you know? A. In Rome?

"Q. Yes. A. We were together almost constantly.

"Q. He was working with you on the problems? A. He was working with us on the problems. We had developed this new route proposal. We discussed all phases and possibilities of this new route. We developed this operations brief. discussed our immediate needs, discussed what we wished to do in the future and we were together, as I say, practically all the time.

"Q. He was cooperating with you? A. Yes."

Page 100, third question:

"Q. Under Exhibit 99"—which, your Honor, now [809] is Defendant's Exhibit AS for identification; it is the so-called operations brie. that Burger and Van Boheman prepared over in Rome and which Colonel Marcano testified he translated and sent to the Venezuelan Ministry of Communications.

"Q. (Continuing) —could you tell us what you said to Colonel Marcano in that regard? A. I felt and told him —you are not interested in what I felt. I told him that I thought the potentiality was very, very great on this projected operation."

Page 101, first question:

Deposition from Mr. Fremont W. Burger

"Q. What did Colonel Marcano say with respect to your estimate?"

That refers to the estimate on the previous page as to potentiality from Rome.

"A. He seemed to be enthusiastic about it.

"Q. Were you enthusiastic about the operation yourself? A. Very."

Page 116. This refers, your Honor, to a meeting between Mr. Burger, Mr. Webb, and Colonel Marcano.

"Q. What was the conversation when Webb and [810] Colonel Marcano were present? A. The conversation was very general, about Rome and the possibilities and what was going on in general.

"Q. What, in substance, did you say and what did the others say? A. I don't remember, Mr. Nickerson. The conversation was most general.

"Q. In substance? A. In substance, we discussed the routes and the business and the possibilities and that sort of thing.

"Q. Did you say what you thought of the potential? A. Yes.

"Q. What did you say? A. I said I thought it was very good."

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[814] Mr. Nickerson:

"Q. Did Colonel Marcano offer to go to Lisbon to accomplish both those objectives? [815] A. Yes."

Page 290, the last question:

"Q. Isn't it true, Captain Burger, that you never found anything, at any time, which gave you any reason to suppose that Colonel Marcano was dishonest in any way? Isn't that the fact? A. I have stated it before, Mr. Nickerson, and I will state it again: I believed Colonel Marcano to be absolutely honest. I believed Colonel Marcano to be absolutely honest throughout my connection with the AVE operation.

"Q. Do you still believe that now? A. You have asked me for a personal opinion?

"Q. Yes."

Mr. Schoenwald: I am going to object.

Mr. Nickerson:

"A. I still believe that Colonel"—

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[817] WILLIAM C. WOLD resumed.

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Redirect examination continued by Mr. Nickerson:

Q. Have you examined, Mr. Wold, Defendant's Exhibits BY and BZ for identification? A. Yes, I have looked them over.

Q. And have you noticed that they speak as of 1953? A. Yes.

Q. And as of 1953, assuming the facts which are set forth in those exhibits existed as of September 15, 1951, would you say that your previous testimony would be affected if you made that assumption? A. Well, the only thing that I see in here, [818] looking it over, this, rather hastily, is that the aircraft show a gross weight of 71,800

pounds, which would indicate that they have the smaller engines, which are not consistent with the fact that they are the Model E. Usually, when the aircraft is converted, as these aircraft have been converted, from C-54-A to C-54-E they have the larger engines installed which allow the 73,000 pounds gross weight.

Q. Do these show that they are C-54-E? A. They show that they are C-54-E, which are ordinarily expected to be the 73,000-pound aircraft with 1450 horsepower engines. These aircraft are shown as having only 71,800 pounds gross weight, so, although I don't see the engines culled out in this report, I am assuming that they are 1350 rather than 1450 horsepower engines.

Q. Is that safe to assume from the gross weight? A. It is pretty much to be expected, yes.

Q. Now assuming that they have those smaller engines on them, what would you say the market price would be as of September 15? A. That might reduce the valuation as much as $50,000.

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[819] Q. Mr. Wold, does Defendant's Exhibit BB for identification show the type of engines? A. It just gives the engine time since overhaul and total time. It doesn't give the engine model type.

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Recross examination by Mr. Schoenwald:

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[821] Q. Assuming for the moment that the engines [822] were the R-2000 type and were available for 12,000 each, and four engines on these planes, I think that is

$48,000, can you tell us any other difference which would account for the $175,000 that you say that these planes were worth and what the other DC-4s sold for? A. Which airplanes are you referring to?

Q. I think you expressed the opinion that USOA airplanes were worth in September 1951—how much did you say they were? A. Between 600 and 625 thousand.

Q. You say you thought that the airplanes that we had were worth approximately 200,000 more than these airplanes that were sold for 415,000; isn't that right? A. That is right.

Q. And so far we have accounted for 48,000 of that difference, with aircraft engines, which leaves us with another $150,000 worth difference to be accounted for. How do you explain that difference? A. First off let me point out that the engines that apparently were on this airplane are not as valuable engines as I would assume that they [823] were. Now the Seaboard Airline aircraft were purchased. I think they were, pretty sure they were, used as cargo aircraft, which means that they would have no interior, other items of equipment—radio equipment and accessories furnished by the buyer rather than the seller. The engines in that particular case, I think the figures that I used were 20,000 apiece, which would be the DC-5 or -13 type engine.

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[824] Q. Now would you tell us, then, what items make up the other $150,000 worth of difference between the $415,000—besides the engines that [825] you have told us about—the $415,000 aircraft and the $600,000 aircraft. A. Well, I don't have the breakdown, but the aircraft, for one thing, could have been and probably were com-

pletely run out, in other words, needing overhaul; and the buyer performing the overhaul of the air frame, that is an item of $50,000, alone, by itself.

The engines, which were in that particular case the dash 13 or higher-priced engines, I use a figure of $20,000 apiece. That would be eighty thousand. There is $130,000. Now there was radio equipment and no passenger interior, things like that, all of which brought out the difference which I use in making my standardization—

Q. Do you know, sir, whether or not USOA's aircraft at this time needed overhaul or not? A. According to the figures that were on your sheet, they did not need an overhaul. One of them only had nine hundred-and-some-odd hours since overhaul. They are good for at least 8000 hours before they need a major overhaul.

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[826] *Redirect examination by Mr. Nickerson:*

Q. I show you Defendant's Exhibit CA for identification, a document dated August 13, 1951, with respect to an aircraft and which shows four Pratt and Whitney engines, Model R2000-7, and ask you what in your opinion would the value of the aircraft as of September 15, 1951 be? A. I see from this document that the aircraft was equipped with smaller engines, the R2000-7, which reduces my opinion of its value. And I would say between $550,000 and $575,000.

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[827] *Recross examination by Mr. Schoenwald:*

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[830] Q. So that one of these aircraft was subject to overhaul and another near most of its life, is that right?

[831] A. No. One of these aircraft had only 900-and-some-odd hours, as I recall, since overhaul and the other had 4000.

Q. You told us that about 8000 was the maximum time? A. I didn't say that. I said that aircraft had to be overhauled or would have to be overhauled as soon as 8000 hours.

The Court: I think you said that after an overhaul it would have at least an expectancy—

The Witness: That is the way I put it.

The Court: Of 8000 flying hours.

The Witness: It could have an expectancy of 10,000 or twelve; it depends on the operator. The CAA keeps some people by experience; they keep running a far longer time between overhauls.

Q. Part of the expectancy of one of these planes, almost half of the expectancy of one of these planes had disappeared already? A. If USOA was operating with CAB approval, 8000 hours overhaul, then about half the expectancy would have been gone. If it had been on 10,000-hour overhaul it would have been 40 per cent.

Q. That would affect your estimate of the [832] value by another twelve to fifteen thousand? A. I included that thinking in my opinion when I said between 600 to 625 thousand originally, because I knew one aircraft had some 3000 hours less than the other one, which is approximately—a good round figure is $5 an hour for allowance for air frame overhaul time. So—

Q. Did you also include in your thinking when, when you told us some figures around 550 to 575, before we

began to get into these items, did you include that 4000 for that estimate? A. Hours?

Q. Hours. A. Yes.

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[868] JORGE MARCANO resumed.

Direct examination by Mr. Nickerson:

Q. Colonel, do you recall that in Exhibit 357, which is the Gotch & Crawford study, there is a statement with respect to an open-end franchise? [869] A. Yes, I do.

Q. What did you understand by that term?

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A. My understanding was that open-end would mean that the franchise did not have a definite date to finish or expire. There was a contract and that as long as I performed, it would be automatically renewed as it was.

Q. You understood that what you had was something that would automatically be renewed provided you performed— A. Performed, yes.

Q. —under its terms? A. Yes.

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[885] Mr. Nickerson: May I just make this short comment and that is that they can't pick out one letter from one of our agents out of context and then not let us explain it by another.

[886] (Defendant's Exhibit BV for identification received in evidence.)

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[897] By Mr. Nickerson:

Q. May I ask you with respect to the cancellation, can you tell us whether or not you gave USOA a credit card? A. Yes, I gave them a credit card.

Q. And can you tell us whether or not you paid [898] $8,440.53 on that credit? A. I did.

Q. That was used after August 15th in connection with the USOA operation? A. Yes.

Q. Can you tell us whether on Defendant's Exhibit CF for identification whether those moneys were advanced to the USOA personnel there mentioned? A. Some were advanced, some were hotel bills that were paid.

Q. Can you tell us whether the advertising referred to on a page entitled "Advertising" on this exhibit was paid? A. Yes, it was paid.

Q. Was that in connection with the AVE operation subsequent to July 25, 1951? A. It was, yes.

Q. Can you tell us whether the bill dated November 28, 1951 headed "Henry Coe—Clerici" was a bill received—first let me ask you whether Coe-Clerici is the agent that was named by USOA and with whom you signed the agreement pursuant to the direction of Mr. Burger as traffic agent for USOA in Rome? A. It is, yes.

[899] Q. Did you receive that bill? A. Yes, I did.

Q. Did you pay it? A. I didn't pay it.

Q. You haven't yet paid? A. I haven't yet paid it, no.

Q. Incidentally, Colonel Marcano, was there mail that was taken back from Rome on the flight of September 9, 1951? A. Yes, there was.

Mr. Nickerson: I will get one more large item, your Honor.

Q. With respect to sheet headed "Payroll—Venezuela, Caracas," can you tell me whether the persons there mentioned were connected with the USOA operation subsequent to July 25, 1951? A. Yes, they were co-pilots, radio operators and hostesses.

Q. And were they paid? A. They were all paid, yes.

Q. By you? A. By me, yes.

Mr. Nickerson: All right, your Honor.

The Court: What is the total amount of the [900] payments?

Mr. Nickerson: I have to figure that up. It is twelve thousand-odd dollars on that item, eight thousand-odd dollars on this item.

The Court: Is it your recollection that the payment made to the co-pilots and other personnel was in excess of twelve thousand dollars?

The Witness: Oh, yes.

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[901] Q. So far in round figures the amounts which you see on Defendant's Exhibit CF for identification— A. Yes. I can say yes because I know it.

Mr. Nickerson: May I offer the sheets which are in evidence, or would you rather I computed it from the—rather, not in evidence, but which are on CF for identification, or would you rather I computed it?

The Court: I think it would be better if you computed it, because if you do anything else, there might be some technical problem of proof.

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[962] The Court: Mr. Schoenwald, I have a feeling you are delaying this trial unnecessarily.

[964] LOUIS ZINMAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

Q. Mr. Zinman, are you a certified public accountant? A. Yes, sir.

Q. How long have you been one? A. Since 1926.

Q. Are you with a firm of accountants? A. With the firm of Mortimer Stern & Company.

Q. How long have you been with that firm, approximately? A. Well, the original firm was since 1931.

Q. Have you in the last few days examined the books of CAVE? A. Yes, sir.

Q. And have you examined Exhibit 357, the Gotch & Crawford study? [965] A. Yes.

Q. And did you make a computation showing the items considered as entering into the loss figures shown on the statement of estimated assets and liabilities as at June 15, 1951? A. Yes, sir.

Q. And basing your testimony on the books and Colonel Marcano's testimony, can you explain to us the computations that you made, if you will do it in summary fashion?

Mr. Schoenwald: I am going to object to that part of the question which asks him to base it on Colonel Marcano's testimony.

The Court: All right. Overruled.

A. Well, I examined—the books of the company were only up to April 30, 1951, and starting with those figures and other information given to me I arrived at the following:

That between January 1st and June 15th there was a profit on the sale of airplanes of $521,000. Deducting from that a loss up to April 30th, according to the figures shown on the books of $16,536, there were certain other items which were not considered in the June 15, 1951 statement.

[966] Q. And in that connection did you use Defendant's Exhibit CC for Identification? A. I did. The amounts not considered consisted of notes receivable, employees' accounts and sundry accounts, amounting to $132,000, agency accounts amounting to $231,000; certain payments made from the National City Bank account which represented expenses of $49,000. Certain payments to directors and loans from the National City Bank amounting to $13,000, and payment of legal expenses of $10,000. An unascertained amount which we considered as being distributed to stockholders or used for expenses, amounting to $55,000. A reserve for foreign exchange amounting to $126,000. A total of $633,000.

There was also on the books at April 30th an operation reserve which apparently was not used. That operation reserve arose partly in 1950, to the amount of $32,900 and partly in 1951 in the amount of $16,800.

Deducting that from the other items leaves a net deduction of $584,000 from the $521,000 or leaving a loss shown on this statement of $62,500.

Q. With respect to that operations reserve, what conclusion did you draw? [967] A. Well, it is good accounting practice to set up a reserve for estimated repairs and the books show that each month the operating expense was charged and the reserve for operations credited. Whenever a bill came in which was applicable to the repairs of these motors, the reserve account was charged.

At the end of 1950—I have to have that other sheet—at the end of 1950 there was a balance in that reserve of 147,000 bolivars and in January and February 36,000 bolivars were charged against it, leaving a balance of the reserve applicable to 1950 of 110,000 bolivars or $32,950. In 1951 there was credited to that reserve account some 54,000 bolivars or about $16,000.

These accounts were still open on the books at April 30th but did not appear on the June 15th statement and I assume therefore that it was not used and reduced the loss accordingly.

Q. If that money which was in the reserve for 1950 but which was not expended in 1950 had been added to the profit, what would that figure have been, Mr. Zinman? Do you have that? A. Well, the amount of the 1950 reserve which was apparently not used amounted to $32,950, and to that [968] extent the operating profit for 1950 could have been increased.

Q. By the extent of $32,000? A. Right.

Q. But you say that conservative accounting practice would require that that reserve remain? A. I would say so, yes.

Q. For tax purposes, however, would you be permitted to take the reserve? A. I don't know about Venezuelan taxes.

Q. No, American taxes. A. American taxes, if you set up a reserve for contingencies but don't use it, they would allow you only the amount that was actually used.

Mr. Nickerson: I will consent that that be stricken, your Honor.

Q. Did you examine the books, Mr. Zinman, to see what income came during the whole of 1950 from tickets, mail,

parcels, excess baggage and charter flights? A. I checked the amount which appears in the ledger and I checked the figures that were posted there with the comprobantes.

Q. Comprobantes are the daily entries, are they? [969] A. The daily journal sheets.

Q. The daily journal sheets. A. Which are entered into a bound journal and from that journal are posted into the general ledger. The items which appear in the comprobantes checked out with the general ledger, and as far as I can determine they were—the income was only from international operations either for tickets, mail, excess baggage, parcels or—and that is all—special flights. The total in that account was 5,743,725 bolivars.

Q. Can you translate that into dollars? A. In dollars it is $1,714,559. The income figure that is shown in the prospectus is $1,717—

Q. Here it is, page 5. A. —$1,717,332. The difference represented an account called miscellaneous income of approximately $2,787.

Q. Could you tell us whether that was from the international operation or not? A. Well, I didn't check that too carefully, but I think it was income from work which was done in Caracas. Now I also noted in that account—that that account was charged with certain expenses which in my opinion should have been charged to an expense account [970] but not used as a reduction in the gross income.

Q. Will you tell us about that? A. There were expenses, Madrid, tickets, expenses for passengers, tickets, passengers, Venezuela from Puerto Rico, transportation of mail from Puerto Rico, items of that nature.

Q. Those were deducted from gross income? A. Those were deducted from gross income. They amounted to 24,000 bolivars or about $7,290.

Q. In your opinion in proper accounting practice would you have required that that 7000-odd dollars be in gross income? A. I would think that they would be charged as expense of operation rather than a reduction in gross income.

Q. The gross income figure would have been increased by some $7,000? A. That is correct.

Mr. Nickerson: That is all.

The Court: I want to ask a question.

By the Court:

Q. You said that you examined the books up to the position of April 30, 1951. A. Yes, sir.

[971] Q. And that you based your conclusions in part on information you obtained for the period subsequent to April 30, 1951? A. Yes, sir.

Q. What was that other information that you used? A. That was a statement of the account of the National City Bank where the income from the airplane was received and the expenses that were—checks—

Mr. Nickerson: That is part—

A. That he paid out.

Q. I didn't hear what the witness said. A. It was a statement of account with the National City Bank where the proceeds of the sale of the airplane were deposited and the checks which were paid out from that account.

Q. The gross figures purport to be a statement of the entire business activity of this company subsequent to April 30, 1951? A. No, just the statement of that account. And the other information that I base my statement on was explanations given to me by Colonel Jorge Marcano.

Q. Did you reduce those to writing in accounting [972] form? A. I have a statement of the schedule here showing how I arrived at those figures.

Q. What do the schedules purport to show? A. It purports to show on what basis the loss that is shown on the statement was arrived at.

Q. As I understand it this company had no current books of account after April 30, 1951? A. That is correct, as far as I know.

Q. And up to what period did you purport to reconstruct after April 30th? A. Up to June 15. But I made the statement that there was an unascertainable figure which we considered to be payments either to stockholders or for expenses which has been unexplained.

Q. In what amount? A. 55,000.

Q. That is all you found that was unexplainable? A. Yes, sir.

Mr. Nickerson: I think the Colonel so testified on that, your Honor.

The Court: Go ahead, Mr. Schoenwald.

Cross examination by Mr. Schoenwald:

* * *

[981] Q. You understand that the currency was blocked in Spain, do you not? A. That is correct.

Q. And that this currency was blocked from January 1950 all the way to the end of 1950, isn't that right? A. I don't know that.

Q. You don't know the currency was blocked during the whole year? A. No, I don't.

Q. Have you looked into the question of blocked currency at all in connection with your preparation? A. No, sir.

Q. Assume with me that the currency was blocked from January 1950 on to the date June 15th, the date of the prospectus, do you know how much was earned by this company in pesetas in 1950 and which was accrued by 1950 in pesetas? A. I know how much the sales were; I don't know how much expenses were deducted.

Q. Do you know what they accrued on the books of the company for pesetas during 1950? A. I just gave you that answer.

Q. Did you look at the ledger page? [982] A. Yes.

Q. Did you look at— A. Do you mean accounts receivable? Oh yes, I know the accounts receivable, what was on the books.

Q. What were the accounts receivable from Spain at the end of 1950? A. I don't have the figure at the end of 1950, but I do have the figure at the end of April 30, 1951.

Q. What were the receivables from Spain at the end of April 30, 1951? A. Well, that I would have to look at some other paper; I haven't got that here.

Mr. Schoenwald: Can you supply him with the other paper?

The Witness: It is in my envelope. Can I have that envelope?

Q. May we have the notes upon which you based your previous testimony?

Mr. Nickerson: May we have it marked for identification, your Honor?

The Court: Yes.

(Marked Plaintiff's Exhibit 397 for identification.)

The Court: Have you got the information [983] what the Spanish funds were which were blocked as of April 30, 1951?

The Witness: Only from the June 15, 1951 statement. The way I base my figures, I took the balance of the agency accounts at April 30th which amounted to some $492,000 and deducted from that the pesetas that were shown on the June 15th statement of two hundred and whatever they were.

The Court: From that, what conclusion—

The Witness: The conclusion—he didn't take into consideration the balance of funds that were due from the other agencies.

* * *

Q. You understand that a large part of that was earned in 1950, isn't that right? A. Some part of it was earned in 1950.

[984] Q. A substantial part? A. I did not check into the amount, but there was some part of it that was due prior to 1950.

Q. Now did you examine whether or not there were more operations in 1950 than in 1951? A. No, sir.

Q. Then you don't know the proportion of operations in 1950 to the proportions in 1951, do you? A. No, I do not.

Q. Do you know the period of operation in 1951? A. From January to April 30th.

Q. And the period of operation during 1950? A. The whole year 1950.

Q. Are you familiar with that part of the prospectus which indicates that they were operating only on a charter

basis during 1951? A. I don't understand. No, I am not familiar with that.

Q. Assume that the prospectus says that, would that suggest, would that plus the fact that the period of 1951 was much larger than the period of 1950, would those facts together suggest to you that the largest portion of this quarter million dollars in pesetas were earned during 1950? [985] A. Not necessarily.

Q. Is there knowledge that you have to suggest that as a matter of fact more were earned during 1951? A. No, that is why I couldn't.

Q. You don't know? A. I don't know.

The Court: He doesn't know. You have covered that very thoroughly and emphatically.

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Q. Was the profit of $19,000 taken in the prospectus for the $58,000 operating profit calculated before or after the taking of the reserve for pesetas? A. Before.

Q. At the time, at June 15, it was clear that there was a need for a reserve for pesetas, isn't that correct? A. At June 15 there was a reserve.

Q. Taken for pesetas? A. Taken for pesetas.

Q. Had this reserve taken in 1951 been noted next to the net operating profit of $58,000 for 1950 a loss would have been shown? [986] A. I don't think a foreign exchange loss is a proper charge against operating profit.

Q. Would the $19,000 figure be affected? A. Yes.

Q. Then the $19,000 figure would have disappeared, wouldn't it? A. If you assume that that was a loss at that date.

Q. Is there any doubt in your mind that 19,000 dollars was earned during 1950? A. Yes, there would be some

doubt in my mind. It depends on whether you are using foreign exchange or whether the fact that it was blocked funds. I don't know whether the foreign exchange rate was less or more than was put on the books.

Q. Did you notice that in 1950 the ticket rate of this company was increased? A. No, sir.

Q. You did not. Had you known that the rate that they charged for tickets out of Spain in pesetas was increased during 1950, would that suggest to you knowledge during 1950 that as a matter of fact the pesetas were no longer worth what they were worth before? [987] A. The way I look at it is that when they sell a ticket they take into income the amount of the sale. If there is a profit or loss on pesetas it wouldn't affect the operating profit; it would affect the net profit.

Q. Would the change of the rate of tickets of the amount of pesetas that were required for tickets during 1950 show you a change in the value of currency? Would that suggest that possibility? A. I would assume so.

Q. I notice on your work sheet that there was $132,710 and $231,053 which apparently were considered uncollectible. A. No, sir.

Q. What happened to that $231,053? A. The explanation that was given to me is that they didn't have an exact knowledge of how much was due from these agencies. That is the figure you refer to, the $231,000. And that wasn't put on the books because they were awaiting information from the branch offices as to how much was actually due, so they could record any expenses that were made and whatever balance of money was due.

Q. Was anything ever shown to you to suggest [988] that they collected 231,000? A. No, sir.

Q. You don't know that the money was collected? A. I don't know that they were paid or collected or uncollected.

Q. As a matter of fact was anything shown to you to suggest that there was a dividend? Did you see any evidence of a dividend? A. No; only from what I was told that they were distributions made to stockholders.

Q. Did they tell you the date they made these distributions to stockholders? A. No, sir, I told you that was an assumed amount.

Q. Even the amount of the distribution to stockholders was assumed? A. Yes, the amount that was unaccounted for was assumed to be either distribution to stockholders or payment of expenses.

Q. You didn't know? A. No.

Q. This $132,000, that was written off, wasn't it? A. No, sir. [989]

Q. Was there any indication to you that that 132,000 was ever collected? A. No, sir, that was not explained to me as being written off. There were certain amounts that he considered uncollectible and some amounts which he considered would be collected. Whether he collected it or not I cannot say.

Q. Did you ask him? A. Did I ask?

Q. Did you ask him if he collected it? A. In some cases he said he collected and some he didn't.

Q. Did he tell you how much he collected? A. No, sir.

Q. Did you ask him how much he collected? A. No, sir.

Q. Can you tell me, of this combined figure representing approximately $370,000, how much of it do you know as a fact, was actually collected? A. I don't know if any of it was collected.

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[990] Q. Is it good accounting practice to offset a large operating loss against a non-operating loss, showing only the net figure? A. On an income statement?

Q. On anything which purports to describe the history or the facts concerning the company. A. If you are talking about a profit and loss statement I would say no; if you are talking about a balance sheet it isn't usual to show any breakdown of profit and loss in a balance sheet.

Q. Let us refer to the text of this prospectus. A. The prospectus is a balance sheet.

Q. The prospectus, I am talking about page 2, paragraph 2. Do you see that? A. Page 2.

Q. Paragragh No. 2. [991] A. Yes.

Q. In so far as the sentence there deals with operating profit—

Mr. Nickerson: Which is that? No. 2?

Mr. Schoenwald: Paragraph No. 2, page 2.

Q. Directing your attention to that area and directing your attention to page 5 of the prospectus, the top of page 5, with respect to that let me ask you: Is it good accounting practice in statements or in the descriptive text material such as appears therein to offset a large operating loss against a non-operating loss, showing only the net figure? A. This is not a statement. This is just an analysis showing the conclusions. You are—

Q. In setting forth text of that character in a writing—

The Court: No, he is not competent to argue with you with respect to the propriety of the narrative statements in this brochure. It is headed "Summary of Findings and Prospects." And that

is a matter for argument later in the case as to what could reasonably have been understood.

Q. Is it not a fact that, as a matter of fact, the offsetting of non-operating profits against [992] losses is a misleading practice? A. Under what circumstance?

Q. In a statement— A. If you are showing the statement of income and profit and loss I would say that if there were material items it would be bad practice not to show the items separately.

Q. In something which describes the net operating profit, is it not misleading to fail to disclose the existence of a larger offsetting profit—non-operating profit? A. In the stating of net operating income? No, sir, it might be in the stating of net income, not—

Q. In the statement of non— A. You see non-operating profit would have no effect on non-operating income. Non-operating expense would have no effect on operating income.

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Mr. Nickerson: While the witness is coming down, may I offer in evidence Defendant's Exhibit BX which Mr. Schoenwald has seen, which Mr. Marshall testified was billed to CAVE. I don't have the [993] bills. I have searched for them and I don't have them.

Mr. Schoenwald: I am not objecting to its introduction in evidence. I am not conceding the value of the items or the authenticity or accuracy.

(Marked Defendant's Exhibit BX in evidence.)

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[993] ALEJO DE CERVERA, recalled.

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[1002] *Cross examination by Mr. Nickerson:*

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[1003] Q. It is fair to say, sir, that the rationale behind—do you know what I mean by "rationale"—behind the provision of the constitution prohibiting the transfer is that if the person who transfers that contract to another person, loses control over that person, that then the Government has no one that it can get its hands on for the purpose of requiring the performance of that contract? Is that a fair statement? A. In my opinion it is going too far.

Q. Why do you say that? A. Because in Section 13 there is no difference [1004] between having no control or—

Q. You have already testified that something certain could be done. A. Yes. I want to be fair.

Q. And you made a distinction, as I recall, between major and minor things; am I correct? A. Yes, because I want to be fair.

Q. Yes. It is fair to say that the criteria which you used in determining that is whether the control is maintained by the person whom the Venezuelan Government can get its hands on? Is that fair? A. No, no. I remember I put the example of the man who hires someone to clean the window directly and the man who goes to a company to send the man to clean the window. That is a petty detail. I can go as far as to that—

Q. Yes, you could go as far as setting up a maintenance base in Italy as I recall. A. Abroad, yes.

Q. And selling tickets and so forth. A. But remember, I am going along with you because I want really not to be fussy or not to be intolerant.

Q. I certainly appreciate that. Now you know that in 1950 and 1951 Venezuela had a de facto military [1005] junta government. A. Yes.

Q. And you know that the executive branch had all of the executive and legislative functions. A. Yes.

Q. And you know that the executive branch could change the Constitution by decree, do you not?

A. Yes.

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Mr. Schoenwald: There are many questions there.

The Court: He said yes to all of them.

Mr. Schoenwald: He kept shaking his head during the course—

The Court: No. You said "Yes" to all of those proposals, didn't you? There was a junta, there was a military junta, which had both executive and legislative powers?

The Witness: It is difficult to say that.

The Court: And they worked by decrees. You don't know that to be the fact, then?

The Witness: I do not know that to be the fact.

The Court: Then the answer is no.

You go ahead.

Q. You knew that there was no legislative branch at all? [1006] A. If I go to the Constitution I know there is—

The Court: No. That is theory. Mr. Nickerson is asking you facts. The theory of government in the Constitution is one thing, but he is asking you whether in fact there was a legislative arm of the Government functioning through a duly elected

congress in Venezuela in 1950 and '51 or whether the legislative power was in the hands of the military junta.

Mr. Nickerson: Apparently he does not know the facts.

The Witness: Apparently I do not know that fact.

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[1007] ALEXANDER ROZAWICK, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Schoenwald:

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[1008] Q. Can you tell us in 1951 what the value of the DC-4 with R2000-7 engines was equipped for passengers? A. Between $250,000 and $350,000.

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[1010] Q. Do you know of any sales on or about September 1951 or very close to that time? A. In that specific time I don't really know of [1011] any sales outside of the periods of time which I have stated.

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[1015] Mr. Nickerson: Reading from page 3 of Mr. Webb's deposition, taken on September 23, 1952:

"Q. Mr. Webb, you were formerly employed by United States Overseas Airlines? A. That is correct.

"Q. During what period were you employed? [1016] A. I was actually on the payroll records from April 15, 1951, until I resigned on June 16, 1952.

Deposition from Lloyd Webb

"Q. Were you an officer of the company at any time? A. Yes, I was.

"What office did you hold or offices did you hold during that period of time? A. I was vice-president of the company and also vice-president of operations and also a director of operations."

Page 7:

"Q. In these phone calls"—

May it be conceded that those are the phone calls which Mr. Cox has testified to between himself and Mr. Webb while Mr. Cox was in Europe and Mr. Webb was in London? Is that conceded?

Mr. Schoenwald: All right. Subject to some correction if I find anything.

Mr. Nickerson: (Reading.)

"Q. In these phone calls did Mr. Cox mention that Mr. Wooten had operated the franchise of AVE and CAVE? A. He didn't mention it in the telephone conversations, he mentioned that in England when we were talking to each other.

"Q. What did he say about Mr. Wooten's operating [1017] the franchise? A. I think he recommended that if Wooten had operated it, it was bound to have been quite a bit of money made."

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Page 12, the last question:

"Q. Did you talk to Mr. Cox after he returned with Defendant's Exhibit 13?"

That, your Honor, is now Defendant's Exhibit N; the contract between USOA and—I think it is N.

The Court: Yes, N.

Mr. Nickerson: N, between USOA and CAVE.

• • •

"A. Yes, he showed it to me and Mr. Clemett at the same time.

"Q. Where were you? A. In Ralph Cox's office at Wildwood, New Jersey.

"Q. Was there any conversation? A. He told us that the contract was signed, it [1018] was completed.

"Q. Did you say anything? A. I just read the contract and then I stated that if I were him I wouldn't have signed it.

"Q. Did he say anything to that? A. He just said he was familiar enough with the aviation business that he could handle it. I asked him if he had an attorney present when he signed the contract and he said no.

"Q. What did you say to that? A. I said I thought he should have had an attorney present.

"Q. Did he reply to your remark? A. Yes; he replied that he had been in the aviation business long enough and he knew what he was doing."

Page 17, next-to-the-last question:

"Q. Before you went down to Venezuela on"—it says "December 9th" but perhaps it will be conceded that it is "September 9, 1951"—that is a misprint.

The Court: Is that conceded?

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

—"did you have a talk with Mr. Cox? A. Yes, I did.

[1019] "Q. Could you tell us where and when and wh

was present? A. The beginning of September; Mr. Jones was present. He wanted me to go down and—

"Q. You mean Cox? A. Yes. Cox wanted me to go down and repossess the airplane.

"Q. What did he say and what did you say as best you recall? A. I didn't say very much. Most of the things I did was just plain listening.

"Q. What did Mr. Cox say? A. He wanted me to go down and repossess the aircraft on the next flight down to Venezuela and divert it into the United States."

Page 20, third from the last question:

"Q. Did Mr. Cox tell you why he wanted to get the airplane back? A. It didn't look like so much money was going to be made and he thought he would make more money on the Korean airlift.

"Q. Did he say that? A. Yes."

Page 21, the second question:

[1020] "Q. Did you ask whether he had a right to pull the airplane off in the light of his contract, Defendant's Exhibit N? A. I asked him about the possibility of a lawsuit and he said 'We will worry about that after we have the airplane back.'"

Page 24, the second question:

"Q. What was the substance of your conversation with Mr. Burger?"

May it be conceded that, if you will refer to the previous part, is a meeting between Mr. Burger, and Mr. Webb in Caracas on or about September 10th?

Mr. Schoenwald: I think it was Bermuda, but it doesn't make much differenee.

Mr. Nickerson: Bermuda or Caracas.

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"A. Mr. Burger asked me—after we left the airport he decided we should ride to town alone in a taxicab.

"Q. Alone? A. Yes, without the rest. He asked me if I was down there to pull the airplane back. I told him that it was nothing definite yet; I was more or less supposed to look over the operations before any plans were made. [1021] I didn't want to alarm him at the time.

"He went into detail explaining the great possibilities of the AVE operation and several other deals that he had so-called cooking, and he went back to talking about the wonderful opportunities that the AVE operation had again.

"Q. Did he go into details as to why he thought the AVE operation was or would be profitable? A. Yes, he did go into details.

"Q. Can you recall in substance what he said? A. Not exactly. I couldn't recall his exact words.

"Q. In substance. A. He just spoke about the potentialities of the tremendous passenger traffic from Rome and also from Madrid and the possibilities of all the westbound traffic that could be taken out of those ports, and he went into it in great length. I couldn't repeat his exact words; it was too lengthy a conversation."

• • •

"Q. Prior to the time that you compiled Defendant's Exhibit 120"—

[1022] Your Honor, that refers to a statement which Webb prepared, and perhaps it will be conceded, at the request of USOA with respect to this litigation.

Mr. Schoenwald: Are you asking me to concede something?

Mr. Nickerson: Yes.

Mr. Schoenwald: We are going to concede that there is a statement and we would like very much to have it in evidence. If you want to offer it in evidence—

• • •

[1023] "Q. Prior to the time that you compiled Defendant's Exhibit 120, did you talk with Mr. Cox about compiling the statement? A. Yes.

"Q. What was your conversation? A. There were so many conversations.

"Q. Can you tell us the first one? A. He just wanted a statement made in regards to [1024] what transpired in Venezuela while I was down there, in regard to the whole story that I told him.

"Q. Do you recall anything else of your conversations with Mr. Cox relative to your making a statement? A. Yes; I recall something else. When I was making up the statement, Mr. Cox told me to make it stronger against Marcano than Burger because, he stated, we were going to have a lawsuit with Marcano and he was the fellow we had to worry about, not Burger.

"Q. Did he ask you to change your statement? A. Yes, he did.

"Q. In what way did he ask you to change it? A. To put Marcano in the No. 1 spot, of accusing him of wanting to steal the bill of sale instead of Burger."

Page 33, the next-to-the-last question:

"Q. Did Marcano ever say to you in Venezuela or while you were coming up to the United States that he had

no concern in your controversy with Mr. Cox as to your ownership of the airplane? A. He made that statement."

Page 39, the last question:

"Q. Was any recording made of any telephone [1025] conversations other than the one that you had with Marcano and Burger on the 14th?"

That is the 14th of September, your Honor.

"A. There were approximately two recordings made and oufside of that I would say Mr. Cox records every telephone conversation regardless. It is standard procedure with him."

Page 44, third question:

"Q. Do you recall in substance what was said in that meeting?"

May it be conceded that that is the meeting of September 15th in USOA's offices at which Mr. Russell was present?

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"A. Mr. Russell demanded that according to the contract the operation be carried on further, give it a chance to prove itself. He said something like that.

"Q. Do you recall anything else? A. Nothing in particular.

"Q. Do you recall anything said with respect to providing a moratorium on the $3,000 a week payable by USOA? A. I think Marcano said he would forget that [1026] temporarily until the operation proved successful."

Page 74, the last question: This is cross-examination by Mr. Halpert:

Deposition from Earl W. Clemett

"Q. I believe you testified that Mr. Burger, when you met him in Venezuela and during your several conferences down there, told you about the AVE operation and that he told you in detail its glowing possibilities. Did he specifically state to you what the present traffic situation was out of Rome? A. Yes, he did.

"Q. What did he tell you? A. That the potentialities were tremendous. The reason that the loads were small was due to misfortune. One bus broke down with a load of passengers on a back road and was stuck and never made it to the airport on time. They waited a day and the bus still couldn't get to the road, it was a washout, due to extenuating circumstances.

"Q. Did he tell you that the visa situation had been cleared up? A. Yes, he told me that it had been cleared up."

I am going to read from the deposition of Mr. Earl W. Clemett taken on the same day.

Page 81:

[1027] "Q. You were at one time connected with USOA? A. Yes.

"Q. When did you start? A. January 1, 1951.

"Q. Did you remain with USOA during the year 1951? A. I did, yes.

"Q. In what capacity? A. Vice-president.

"Q. Through the entire year? A. That's correct."

Page 88, last question:

"Q. Could you tell us in substance what the discussion was between you and Cox after you read Plaintiff's Exhibit 1?"

It is now 357, the Gotch & Crawford study, your Honor. And may it be conceded that this is a

meeting between Clemett and Cox prior to July 25, 1951, and in the vicinity of July 17th the previous questions?

Mr. Schoenwald: Subject to correction, yes.

Mr. Nickerson: Instead of doing that, then I will read each previous question—the two previous questions:

"Q. Would you give us the date of this conversation? A. This was probably two or three days prior to its being signed.

"Q. Prior to July 25, 1951? [1028] A. Yes, probably in the vicinity of July 17th to the 21st, somewhere around that time.

"Q. Could you tell us in substance what the discussion was between you and Cox after you read Plaintiff's Exhibit 1?"

That is now 357.

"A. I hadn't completely digested the whole thing but I still kept arguing with Mr. Cox on the point that if it was such a glorious opportunity, why did the man sell his own airplanes. Even if his airplanes were in bad shape, he could have sold one and with the money fixed the other one and gotten another.

"Q. Did you talk to him on that subject one or several times? A. I would say probably three times.

"Q. In each instance did you raise the same point, namely, that you questioned why he got rid of his airplanes, if it was a profitable operation? A. I would say yes. I also raised the point that for the year he showed his operation in 1950, it just happened to be Anno Sancto or something, a Catholic holiday, some rites that could

only take place in Rome; he had religious priests going back and forth that wouldn't be traveling any other time.

[1029] "Q. Did you discuss that with Mr. Cox more than once? A. At least once."

Now, your Honor, I am going to read from the deposition of Mr. Cox.

• • •

[1030] Page 63, first question. And may it be conceded that this is also in the conversation with Mr. Marshall?

[1031] Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"Q. Did you tell him, do you recall, what the market value of the planes you had was? A. We presumed the market value to be around $500,000 to $600,000 at that time per plane, because the demand was such that it pushed the price up there. As a matter of fact, I believe Marcano was the first who had ever sold a C-54 for $500,000, a rather high figure at the time."

Page 405, and this is the last, your Honor:

Mr. Schoenwald: 405 of Mr. Cox?

Mr. Nickerson: Yes. May it be conceded that this is in the meeting at which Mr. Russell attended on September 15, 1951?

Mr. Polak: My notes show it is the 14th.

Mr. Nickerson 14th.

Mr. Schoenwald: The meeting in New York, in September.

Mr. Nickerson: Yes.

Deposition from Ralph Cox, Jr.

"Q. My question is, did you discuss the terms of the contract?"

Then there is some colloquy: and again:

"Q. Will you finish your answer and answer my question. [1032] A. I told these people that as far as we were concerned, the contract was done; we were pulling out and we had nothing more to do with it. We were hoodwinked. They were trying to steal our airplane, in our opinion."

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[1033] (Defendant's Exhibit CD received in evidence.)

• • •

[1042] Mr. Nickerson: Your Honor, I can concede with respect to these documents which we were shown which Mr. Zinman had been studying, either that they relate to national operations or that they appear on the books. In fact, we know they do not appear on the books.

The Court: Very well.

[1043] Mr. Nickerson: I am sorry. That was not credited to the operational accounts.

The Court: As I recall, Mr. Schoenwald did not press his question with respect to these documents after I sustained your first objection. All right.

• • •

[1048] The Court: Now, gentlemen, I think that, in accordance with the usual practice, the defendant should speak first, but since there are counterclaims here I have no objection if you wish to reverse the usual order; but I think Mr. Nickerson should address himself first to his case, and then I will hear Mr. Schoenwald.

Mr. Nickerson: Whichever your Honor prefers.

The Court: Then I suggest that you begin your argument.

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[1053] The Court: There was some delay, as I recall it, about the Lisbon rights, wasn't there?

Mr. Nickerson: I am talking now about September 14th. We got the Lisbon rights September 8th. I am talking as of the date of September 14th. But the Lisbon rights were in complete order. We have a document which shows that.

• • •

[1055] But certainly that would not entitle him to rescission of the contract.

The Court: I understand that as a proposition of law, and I think I can save you some time by telling you that to the extent that this case is based upon the failure of CAVE to provide full loads, I do not regard that as a valid ground for damages or for rescission because there is nothing in the contract or in the relationship between the parties which could reasonably have justified USOA in contemplating that CAVE held out a guarantee of full loads. All of the evidence indicates pretty clearly that this business had to be built up, that efforts had to be expended to build it up, and that they could not expect to be carrying full [1056] loads of passengers right from

the beginning, and I think that appears right out of the papers and testimony of USOA itself.

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[1062] The Court: Here was a company which was as close to being in a position of non-operation and complete frustration as it is possible for it to be. It had sold its equipment. It no longer was running schedule flights. It had lost substantial amounts of money. It had lost a very substantial amount of money just before this contract was executed.

• • •

[1063] True, it had a valuable franchise.

Mr. Nickerson: That is what I am asking for, damages for loss of that, your Honor.

The Court: Just a minute. We have got to relate the value of the franchise to the surrounding circumstances. A man who was dying of thirst in the middle of the Sahara Desert would gladly exchange a ton of coal for a quart of water, and a ton of coal in the middle of the Sahara Desert to a man dying of thirst is of no value at all.

Mr. Nickerson: Correct.

• • •

[1064] Mr. Nickerson: Let me explain to your Honor first that by the end of this contract, as an absolute minimum, CAVE would have had in its treasury some one hundred and fifty-six thousand dollars.

The Court: How do you arrive at that?

Mr. Nickerson: Because it gets that in its $3000 a week guarantee, and all of the other expenses are to be paid by USOA.

The Court: You mean assuming that USOA adhered to the literal terms of this contract right to the end of the year the Venezuelan company would have collected exactly what?

Mr. Nickerson: Exactly to the dollar, your Honor, no less than $144,000.

The Court: How do you arrive at that figure?

Mr. Nickerson: They were guaranteed $3000 a week under paragraph 1(f) of the contract.

The Court: Didn't you waive a substantial part of that?

Mr. Nickerson: No, your Honor, we did not waive it at all. That was on the supposition that a new agreement could be reached thereafter.

The Court: No, I thought part of it was.

[1065] Mr. Nickerson: No, I waived the $2,250 which was the first roundtrip and the trip back from Caracas to Rome.

The Court: Are you including in that waiver—

Mr. Nickerson: No, I am not. $144,000 they would have got, irrespective.

• • •

[1066] Bear in mind that the immigration from Europe to Venezuela, bear in mind that tremendous public works program in Venezuela and the tremendous flow of immigration that has been increasing every year from Europe to Venezuela. So I do not think that it is fanciful to assume that this could have been made if USOA had lived up to its contract. This was a very valuable thing; this was one of the last routes in the world to be developed.

The Court: This business of transporting immigrants is a highly competitive one in which national interests are frequently very involved, and there is no assurance

that any specific proportion of this would have gone by air, or if they had gone by air, whether they would have gone by your country's. It is something that is in the realm of speculation.

Mr. Nickerson: The only way you can look into the future is to make reasonable assumptions from what has happened in the past. LAV started flying this route. Your Honor heard Colonel Marcano testify that he took over this route and he started flying. So it was not any losing operation. Of that we can be sure.

The Court: Was LAV organized when this [1067] company gave up its franchise?

Mr. Nickerson: It is not in the record, your Honor. Do you want me to tell you?

The Court: No, never mind. I thought it was. Didn't Colonel Marcano testify that he had had negotiations with SAS and that they came to nothing?

Mr. Nickerson: Yes. You see at that time of course there was a terrific equipment squeeze, as your Honor has heard, but had they been able to keep alive for that year and had USOA lived up to its contract, they would have had all that money in the till which they could have used to keep this thing alive.

I don't want to dwell on it. That is the only way we can look into the future, is to make reasonable inferences from what has happened in the past. And I ask for $500,000 for the value of the franchise on the basis of the evidence which is in.

The Court: Do I understand you correctly to say that if USOA had complied with what you deemed to be its obligations under this contract, that then CAVE would have collected by the end of the contract period roughly $140,000 in cash?

Mr. Nickerson: $144,000 minimum, absolute [1068] minimum.

The Court: And that by the use of this cash CAVE would have been enabled to preserve the existence of its franchise, but that the loss of this cash was the direct cause of the loss of the franchise and therefore USOA should pay for the franchise as well?

Mr. Nickerson: Well, your Honor, I would not put it quite that way. I would say a minimum, they had to get $144,000 on their $3,000 a week guarantee from USOA over the term of the contract. They could have used that $144,000 net—not a nickel's worth of expense came out of that. All that was paid by USOA. They could have used that $144,000 to finance or otherwise keep alive, whether by renting planes on a dry lease basis, whether by entering into some deal perhaps for the purchase of them, whether this is an effort to finance it or some other way, but I say it is reasonable to assume that if a company has $144,000 net at the end of a year, that it isn't just going to give up the ghost and say, "This is the end."

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[1070] Now to answer your question directly, your Honor, I would only say they would be reasonable for those damages which they reasonably could foresee at the time that they entered into the contract, and I submit to your Honor that USOA certainly reasonably could foresee this eventuality.

The Court: You make that argument notwithstanding the fact that CAVE was already in imminent danger of losing its franchise before it entered into this contract, by virtue of the sale of its equipment and its inability to maintain flight schedules?

Mr. Nickerson: I think that increases the validity of my argument, because it gave USOA good reason to suppose that if they pulled out of this that the franchise would be lost, and, in fact, Mr. Russell's testimony, your Honor, that at the meeting on September 15th the valuable thing to us here is the franchise and if this thing is pulled back here and if you pull it [1071] out, we are going to lose the franchise—we put the franchise in jeopardy; I don't recall the exact wording, but there was certainly testimony of that character at that meeting.

So that I certainly think they could reasonably foresee that as a result of their breach we would lose this very valuable thing, and what value you put on it of course is a matter that you can't tie down as if it were damages for a breach of a bond and mortgage, because it inevitably has to be a process of forecast based upon reasonable assumption of what has happened in the past.

• • •

[1077] Mr. Schoenwald: • • • [1082] Is the rent that one particular tenant, namely, a party to this action, is willing to pay for the franchise adequate evidence of its value?

The Court: Yes, that is the best evidence. It is the value reached at arm's length after careful negotiation and inquiry, as to both parties, as to what [1083] would best serve their individual interests.

Mr. Schoenwald: I think not, your Honor. I think the cases indicate that value has to be based upon experience and upon market value; that one person could be misled into assuming that a particular thing is of great value—

The Court: If what you are referring to is your case for fraud, I don't think there is any basis for it at all. Of course I agree to the naked principle that very often people will be induced to enter into improvident contracts

as a result of fraud, deceit or other imposition, and obviously such a contract would not possibly stand as a reasonable measure of the value of the consideration, but absent a proper showing of fraud and deceit or other imposition, you are in no position, it seems to me, after the proof in this case, to argue that what USOA agreed to do here was the result of some form of fraud or deceit or that USOA entered into an improper contract.

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[1093] Mr. Schoenwald: • • • [1094] We have not been able to demonstrate to the Court's satisfaction that the Colonel was the author of this plot to steal the bill of sale. However, the mere standing by and omitting to mention this is in itself a breach of the obligation.

The Court: A breach of what obligation?

Mr. Schoenwald: It is a breach of his obligation as an employee of the contracting party. As a matter of fact, I think that even if they were not contracting parties, the knowledge of one citizen that some other citizen was about to steal his property is something which he is obliged not only to report to the citizen but to the government.

The Court: I think it is just atmosphere. I think it has nothing to do with the case. Mr. Cox certainly didn't come forward and produce all of the [1095] mortgages on these planes or all of the part-interest in the planes. There is no showing that he pulled out of his safe every single document bearing upon the title to these planes. And why should an incident of a collateral nature have anything to do with the dispute over the prior proprietorship of one of these planes suddenly thrust Colonel Marcano in a position where he stands over everybody as a

sort of guardian? He wasn't. He wasn't a trustee, a fiduciary.

• • •

[1111] Mr. Schoenwald: I would like to continue with this for a moment. I think that my adversary would perhaps, in connection with my reference to point 1-I, advert to the clause which guarantees payment of $3,000 [1112] a week, and I perhaps should not anticipate that, but I think that it bears consideration.

I think you will note that throughout the correspondence between the parties and indeed throughout the contract, that the concern of the defendants was with our ability to furnish the aircraft and get them there on time. The contract provides in clause 1(b) that we are to immediately replace any aircraft not able to perform and serve, that we are to put the airplane down by September 15th, that we have a certain amount of time not to put down two airplanes, but for 60 days we need not operate regularly if it is economically difficult for us to do so. And I suggest that the guarantee of payment of $3,000 a week after September 23, 1951, when we then first had a firm obligation to fly, irrespective—or pay $3,000 a week, is an effort by the defendants to be sure that two airplanes are committed or that that many trips are flown, and that the failure to fly because we might have a more profitable load elsewhere, or we don't own the airplanes or don't maintain them otherwise, could result even in the absence of our flying in a payment of $3,000 a week. So the provision for the payment of $3,000 a week goes to the defendants whether we fly or not, and the [1113] contract is replete with concern over the necessity of our flying.

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[1116] I would like to suggest that the defendant is in a bit of a dilemma. On the one hand, Colonel [1117] Marcano maintains he has no duty to us whatever, nothing to do but keep the franchise in good order; wrote letters to the right people, make the right statements to the right political people. On the other hand, he said we had all the important duties because, after all, that is our franchise. I suggest to your Honor that the Colonel has been attempting to straddle, throughout this trial, this problem. That he had no duties, so he couldn't be found in breach of them, and to claim that all of the responsible duties he did have—

The Court: You were trying to exploit this franchise, weren't you? You were the active exploiters of the franchise. His role was a passive one. You sought this situation as a business opportunity and you sought to exploit it. And while it is true that he reserved very extensive rights and control, is it fair to say that he should be blamed because he didn't exercise them? You didn't want to be interfered with. You were taking over, so to speak, the running of those schedule flights, and you were operating under his franchise, and that was the position of the parties at the time you entered into the contract. Now why do you say he was straddling? There was nothing for him [1118] to do except what this agreement said he needed to do, and most of the active, aggressive, day-by-day exploitation and business decision was to be carried out by you.

Mr. Schoenwald: That is correct, your Honor. However, I think the Colonel had a duty to maintain the rights in good order, which he didn't, and I would like to address myself to his failure to maintain the rights in good order.

Colloquy

The Court: Which rights?
Mr. Schoenwald: The European rights.
The Court: Which ones?
Mr. Schoenwald: Italy.

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[1120] Your Honor has already brought forward that with respect to rights in Portugal.

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Translation of Opinion of Dr. Ramon Tenorio

In the hearing of the 21st of June 1956, during the afternoon, I appeared and testified before the Honorable Court, as an expert witness on certain questions of Venezuelan law relative to the contract between CAVE and USOA.

I was asked by the attorney for CAVE whether in my opinion the contract between CAVE and USOA, dated July 25, 1951, constituted, under Venezuelan law, a transfer of the rights and obligations acquired by CAVE under its contract with the Federal Executive of Venezuela, and I replied that in my opinion that contract between CAVE and USOA did not constitute a transfer of those rights and obligations. At the request of the same attorney I gave the legal reasons which served as the basis for my opinion.

Cross-examined in the same matter by the attorney for USOA, I sustained repeatedly my opinion and the reasons I gave to substantiate it.

With this opportunity to submit for the consideration of the Court my position, I respectfully do so in the following terms:

First, I reaffirm in toto my testimony heretofore given. Second, it is my firm conviction that the contract of July 25, 1951 between CAVE and USOA does not, under Venezuelan law, constitute a violation or a transfer of the rights and obligations acquired by CAVE under its contract with the Federal Executive of Venezuela, because at all times CAVE maintained and exercised control of USOA. That control by CAVE and USOA appears expressly in the two stipulations or clauses, which in my opinion constitute the key factor in the contractual relations between both parties. I refer specifically to the

stipulations contained in paragraphs 3(B) and 2(C), respectively of the contract between CAVE and USOA, and which deserve detailed analysis.

Paragraph 3(B) of the contract above referred to expressly provides: "Matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the Board of Directors of CAVE." This clause clearly sets forth that both matters of policy of the company and matters of major concern relative to the conduct of the operation are reserved for formal decision of the Board of Directors of CAVE.

Now, it may be asked: What does that operation consist of and which are matters of policy of the company and matters of major concern relating to the conduct of the operation? In my judgment the operation consists in the flights and in the transport by aircraft of passengers, cargo and mail. In accordance with its special character, "the matters of major importance relating to its conduct," must be those matters which are referred to as maintenance services, traffic functions, ticketing, etc. In harmony with that analysis, it appears to me that the matters of policy of the company must be those referred to as relations with the public in general, passengers, and owners, shippers and consignees of the cargo and mail, as well as with the governments of those countries on the route having terminal points at Caracas and Rome.

In addition, under the provisions of paragraph 2(C) of the contract between USOA and CAVE the latter reserves the right to make final decisions on all matters relating to personnel. In other words, CAVE has the right to veto anything concerning the personnel, and by virtue of that power of veto CAVE could reject any decision or act of USOA which CAVE considered inconvenient or injurious

to its interest or to the good name and credit of the Venezuelan flag.

From this analysis, I conclude that CAVE, in accordance with the control which it exercised over USOA and over the flights and over all maters related to the same, maintenance, traffic, ticketing, personnel, etc., did not at any time or in any case relinquish or intend to relinquish the franchise granted by the national government of Venezuela or the rights and obligations derived from that franchise.

On the other hand, in the memorandum dated July 30, 1951, which is in the record, CAVE informed the Federal Executive of Venezuela through its appropriate branch, the Ministry of Communications, of the arrangements which CAVE had made with USOA. In that memorandum CAVE informed the Minister of Communications of Venezuela that in order to reactivate the operations of the company, USOA had agreed to supply two DC-4 aircraft and a third aircraft in case it was needed for the better development of the operations and that in the same way USOA obliged itself to furnish the working capital needed, all technical help needed by CAVE and to train Venezuelan personnel. The aforementioned memorandum adds that CAVE agreed to sell to USOA up to forty per cent of CAVE'S authorized shares.

Therefore, the Federal Executive of Venezuela by this memorandum, and by the memorandum dated August 14, 1951, obtained complete knowledge of the arrangements between CAVE and USOA. What then was the attitude of the Venezuelan Government with respect to this agreement? Was it a negative or a positive attitude? I have no doubt that it was a positive attitude, in other words, that the aforesaid agreement was approved. That positive attitude becomes very clear from the fact that the

Minister of Communications, as the appropriate branch of the Federal Executive of Venezuela in these matters, having full previous knowledge of the arrangements between CAVE and USOA, directed the Office of the Minister of Foreign Relations of Venezuela to request from foreign governments the corresponding permits and other privileges for CAVE. In my opinion that constituted written, and therefore express, approval of the above-mentioned agreement.

Moreover, I consider that the contract between CAVE and the Federal Executive of Venezuela is a contract of public interest within the meaning of the Venezuelan Constitution, that is to say, that the state and Venezuelan nation are interested in it. The contract between CAVE and USOA is not such a contract, because, among other reasons CAVE did not relinquish, but on the contrary always retained for itself, the franchise granted. It is evident that if the contract between CAVE and USOA had been deemed by the Venezuelan Government a transfer of the franchise, the contract would have violated the provisions of the franchise. The sovereign government of Venezuela in defense of the rights and interests of the state and Venezuelan nation not only would have rejected the contract but also would have demanded its cancellation, and we know that this did not happen. I have stated before that the national government of Venezuela gave written approval to the agreement between CAVE and USOA, which is sufficient proof that it is perfectly legal.

Third, we now examine in the light of the juridical doctrine and the law of Venezuela what a cession or transfer is and what are the legal effects thereof.

Cession is the transmission by an act between living persons of an incorporeal object, a right, for example. It is one of those contracts which has for its object the

transmission of property or of a right. The right ceded is transmitted, and the transferee acquires it, along with the danger and risk thereof. In other words, the transferee acquires for himself the right ceded, acquires full control over the right ceded, and acquires likewise the exclusive power to exercise all actions inherent in that right. By virtue of the transfer, the transferee takes the place of the transferor. If, as I here deny, the agreement between CAVE and USOA had constituted a transfer, a juridical relationship would have been established between USOA and the Federal Executive of Venezuela, and we know that that is not the case. Moreover, could USOA, as if it had been a transferee, dispose freely of the obligations and rights which are contained in the contract with CAVE? Could USOA, for example, determine and exercise for its own account and risk, without the consent, approval or intervention of the Board of Directors of CAVE, the matters referred to in 3(B) of the contract? It is evident that USOA could not. By the same token, could USOA make final decision and carry out by itself, outside the control of CAVE, all the matters relating to personnel? It is certain that USOA could not do this either. Finally could USOA transfer freely even one of the rights or stipulations set forth in the contract with CAVE? This could not be done either, in the light of the express prohibition contained in paragraph 3(F) of said contract. Then, if USOA was unable to dispose freely, with an exclusive power, of any of this, the clear conclusion is that there is no cession, and therefore that there has been no transfer.

Fourth, the transfer having been denied, let us examine to see whether there has been any violation. A violation is the action of violating, of breaking a legal precept or a contractual obligation, or of not complying with what has been agreed upon.

Let us make a review of the provisions of the franchise between the Federal Executive of Venezuela and CAVE. In reference to these provisions let us see if the contract between USOA and CAVE violates the franchise.

By the first clause of the franchise there is granted to CAVE a franchise, that is to say, authority to exploit in the country, in conformity with the franchise and subject to other applicable laws, a public aviation transportation company for the transport of passengers, cargo and mail and for flights for advertising purposes, etc., etc. For reasons which have been set forth in my oral testimony before this high tribunal, and which have also been set forth in this opinion, I consider that there has been no transfer of violation by CAVE of that clause.

By the second clause, the duration of the franchise is fixed as one year from the date of signature, and establishes the obligation on the part of the contractor to accomplish regularly the flights which have been undertaken by the company, etc. From an examination of that clause one can see that it does not oblige CAVE itself, without agents, to accomplish regularly the flights which are stipulated therein. In other words, the clause does not prohibit the contractor from accomplishing the flights by means of a contract with another aviation company. In my opinion this was the intention of the contracting parties. What is contained in clause II must be read in connection with clause III, which provides that "the aircraft in the service of the company and owned by the company." In other words clause III makes a distinction between aircraft in the service of CAVE and aircraft which are owned by CAVE. This means that CAVE could operate flights with aircraft which were not owned by CAVE. Even when USOA operated the flights there was no violation of the above-cited clause II for these two

reasons: first, because no transfer was made, and second, because the government of Venezuela accepted and approved the fact that USOA accomplished the flights in accordance with the correspondence which CAVE sent to the Minister of Communications and which is in the record.

Under clause III of the franchise the aircraft in the service of the company and those owned by the company were required to pay the appropriate charges for the use of the civil airports and of their facilities. It is my understanding that these payments always were made by CAVE to the Government of Venezuela. USOA made payment to CAVE, and CAVE paid the Government of Venezuela. Therefore, the juridical relationship which arose out of the franchise between the Federal Executive of Venezuela and CAVE was permanent and unaltered, and the Federal Executive could always claim from CAVE the fulfillment of the obligation imposed by that clause. In addition, the payment of the charges for the use of Venezuelan Civil Airports and of their installations is one of the matters of major concern relating to the conduct of the flights, which by paragraph 3(B) of the contract between CAVE and USOA was reserved for the determination of the Board of Directors of CAVE. For these reasons, I consider that there has been no violation of this clause.

Clause IV of the franchise establishes that the aircraft of the State and of those others specifically mentioned, shall have the right during the life of the franchise to the free use of the airports owned, administered or enjoyed by the contractor or his company, and also the lighting service, radiotelegraph, radiotelephone and meteorology of the same. In my opinion, these provisions refer solely to the airports and to the lighting service,

radiotelephone, etc., owned, administered or enjoyed by the contractor or his company at the time of the execution of the franchise. In other words the clause does not oblige the contractor to create or purchase a private airport or to take over the administration or enjoyment thereof. This interpretation appears logical to me in the light of the fact that in Venezuela no private aviation company owns airports. Aviation companies in Venezuela, whether owned by the State, partly owned by the State, or privately owned, as well as foreign companies which operate in the country by reason of international agreements, always use the airports owned by the nation. For these reasons this clause has not been violated.

Clause V of the franchise fixes the Venezuelan percentage of the personnel, non-skilled, administrative and technical which must be employed by the company. But it also provides that the Federal Executive may reduce the per cent of the technical personnel by reason of a proven scarcity thereof.

CAVE by it memorandum dated August 14, 1951 informed the Government of Venezuela of the situation in that respect. That memorandum was addressed to the Director of Civil Aeronautics of the Ministry of Communications. Since we know the Ministry took affirmative steps to obtain for CAVE from the foreign governments the respective permits and other privileges, it is my opinion that this clause was not violated. If there had been any irregularity with respect to the Venezuelan percentage of personnel, as required in clause V, the Ministry of Communications of Venezuela, which has under its charge the inspection and control of everything relating to civil commercial aviation, would have made this clear and would have demanded the carrying out of the franchise or would have required compliance with the

provisions of this clause, and neither of these things occurred.

By clause VI CAVE agrees to train Venezuelan personnel. But under the agreement with CAVE, USOA assumed the obligation of training the Venezuelan personnel. CAVE so informed the Government of Venezuela in the memorandum dated July 30, 1951 addressed to the Ministry of Communications. The Ministry made no objection or criticism in that respect. We know the attitude taken by the Ministry. Therefore, I judge that there was no violation.

By clause VII the aircraft of the contractor must carry a Venezuelan co-pilot in each flight. This clause is vague because it does not state whether it refers to aircraft owned by the contractor or aircraft in the service of the contractor, in accordance with the distinction made in clause III. In the light of this vagueness a restrictive interpretation must be taken, in conformity to the logical rigor of the sentence. Textually the clause recites "on each flight the aircraft of the contractor." In my opinion this refers to the aircraft which are the property of the contractor and not to the aircraft in the service of the contractor. But, in addition, the record shows that on all flights made by USOA a Venezuelan co-pilot was used. For this reason this clause was not violated.

I conclude this memorandum, reaffirming to the Honorable Court my opinion, based on the reasons, doctrines and law discussed, as to why the contract between CAVE and USOA does not constitute a transfer or a violation either of the franchise granted to CAVE by the Federal Executive of Venezuela or of the rights and obligations inherent or derived from that franchise.

(Signed) RAMON TENORIO S.

July 10, 1956.